Supreme Court, U.S.

001649 APR 30 2001

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tactical use of force (in this case, limited applications of pepper spray) to overcome resistance to a lawful arrest, which poses no significant risk of physical injury – and causes *no* physical injury -- amounts to unreasonable force under the appropriate Fourth Amendment standard?

2. Whether, in a case alleging the use of constitutionally excessive force, the law is always 'clearly established' such that law enforcement policy makers are denied qualified immunity for authorizing a tactical use of force to overcome organized resistance to lawful arrest by means which pose no significant risk of physical injury and cause no physical injury?

PARTIES TO THE PROCEEDING

– Petitioners –

County of Humboldt, Sheriff Dennis Lewis, Chief Deputy Gary Philp, and City of Eureka.

– Respondents –

Molly Burton, Vernell "Spring" M. Lundberg, Michael McCurdy, Eric Samuel Neuwirth, Maya Portugal, Lisa Marie Sanderson-Fox, Jennifer Schneider, Terri Slanetz; and Noel Tendick. Headwaters Forest Defense is no longer a party to this action.

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PETITION FOR WRIT OF CERTIORARI

The County of Humboldt, the City of Eureka, Sheriff Dennis Lewis, and Chief Deputy Gary Philp petition for a writ of certiorari to review the published decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) is reported at 240 F.3d 1185. This opinion amended and superseded the opinion of the Court of Appeals reported at 211 F.3d 1121. The opinion of the District Court is published at 1998 WL 754575 (N.D. Cal.). App., *infra*, 40a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 2001. This judgment amended the prior opinion, and denied petitioners' request for rehearing and suggestion for rehearing en banc. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Title 42, United States Code section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT

The nine plaintiffs are affiliated with EarthFirst!, a world-wide movement which advocates and practices criminal actions ("direct actions") to advance purported environmental causes.[1] The present litigation involves three separate "direct actions" staged in Humboldt County, California to obstruct and otherwise protest logging. One of the incidents occurred in the local offices of a United States Congressman.

In each of the "direct actions," plaintiffs locked themselves together with steel devices known as "Black Bears."[2] App., *infra*, 42a. These devices weighed approx-

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[1] EarthFirst! and similar groups were involved in the World Trade Organization protests in Seattle and the IMF/World Bank protests in Washington, D.C. *See*, for example, December 13, 1999 *Time*, Vol. 154, No. 24, "Anarchy In Seattle;" April 24, 2000 *Newsweek*, "Getting Ready For Seattle II," regarding seizure of a carload of "lock boxes" (such as the "Black Bears" used here), at p. 40; *and see* http://www.protest.net and http://www.earthfirstjournal.org. These events underscore the national importance of the issues in this case.

[2] The factual background set forth below is taken primarily from the District Court's order granting judgment as a matter of law. App., *infra*, 42a-45a.

imately twenty-five pounds, and consisted of two steel cylinders welded together to form a right angle.[3] A steel rod is welded into the center of the cylinders at or as close as possible to the right angle. The plaintiffs attached their wrists inside the Black Bears by using a metal bracelet that is clipped to the steel rod. Using these devices, plaintiffs linked themselves arm-to-arm for the sole purpose of resisting arrest.

Each of the three incidents were videotaped by the Humboldt County Sheriff's Department.[4] Edited portions of these videotapes were broadcast by the news media both nationally and abroad.

In the first incident, eight activists, including four of the respondents, entered and occupied the offices of Pacific Lumber Company during business hours, and locked themselves together in a circle using the Black Bear devices. In response to this intrusion, employees of the company called police, and several members of the Humboldt County Sheriff's Department responded.

The Sheriff's Department and other local law enforcement had responded to hundreds of similar incidents since 1990. In order to defeat the steel lock-down devices on previous occasions, the Sheriff's Department had developed a method of manually cutting out the activists using a Makita grinder. The Makita grinder is a power tool capable of cutting through steel.[5] The undisputed evidence at trial established that "use of such a cutting device poses a substantial risk of injury to both

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[3] *See* photographs, App., *infra*, 53a ("Black Bear" is "L"-shaped device).

[4] These videotapes were admitted into evidence at trial. Copies of one of the videotapes have been lodged with this Court.

[5] *See* App., *infra*, 54a, for a photograph depicting a Black Bear device cut with the Makita grinder.

the locked-down protestors and the operating officer." App., *infra*, 48a.

As an alternative to the use of the grinder, officers on the scene determined that the tactical use of oleoresin capsicum ("OC" or "pepper spray") was the safest means of effecting the arrests.

After repeatedly asking the activists to release and warning them that if they did not comply OC would be applied, a small amount of liquid OC was applied to the outside corner of the plaintiffs' closed eyes by cotton swab. This method of application was specifically designed to minimize exposure to airways, and to the other occupants of the office building. Before applying OC to each individual, the deputy applying it pled with the individual, asking him or her to release. Only after the individual refused to cease resisting arrest was OC applied. Ultimately, all but four of the activists voluntarily released in response to either the use of OC or the threatened use of OC. The four (in pairs) remaining activists had to be carried outside of the office building, where one pair then released and the others were separated using the Makita grinder.

The next incident occurred eight days later, again on Pacific Lumber property. Two of the plaintiffs locked themselves together through the treads of a Caterpillar tractor, linking themselves with a single Black Bear device. The responding Sheriff's Department personnel determined that the risk of injury and fire mandated that OC be used before attempting to cut out plaintiffs. Once again, plaintiffs were repeatedly warned that if they did not release, OC would be applied. In spite of the application of OC, including by spray, plaintiffs refused to release and ultimately had to be cut free from the tractor using the Makita grinder.

The third incident occurred in the offices of (former) United States Congressman Frank Riggs.[6] Four of the plaintiffs and other individuals entered the Congressman's office during business hours, deposited a tree stump and wood shavings onto the floor, and then locked themselves around the stump using the Black Bear devices. Again, the responding officers decided that risk of injury and fire danger favored an initial attempt to gain compliance by application of OC. Once again, the officers repeatedly warned plaintiffs of their intention to use OC and requested that they stop resisting arrest, to no avail. OC was then applied, causing plaintiffs to eventually release from the devices.

As observed by the District Court in granting judgment as a matter of law "[plaintiffs] introduced no evidence of a significant risk of physical injury or actual physical injury resulting from the use of OC" in any of the incidents. App., *infra*, 43a. Furthermore, in each of the incidents the deputies applied water from a spray bottle, in some cases before plaintiffs released, in order to limit the discomfort caused by the pepper spray. App., *infra*, 48a.

The undisputed evidence at trial established that prior to the use of pepper spray, officers in the field had been regularly called upon to remove activists from various mechanical devices for several years prior to the incidents in question, and voiced their safety concerns up the chain of command. The undisputed evidence established that, prior to the authorization of the tactical use of OC, Chief Deputy Gary Philp consulted with a chem-

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[6]It was undisputed at trial this was *not* a political office. Rather, it provided constituents with assistance in accessing federal agencies. Staff testified that this had included such matters as obtaining temporary checks through Social Security and locating a life-saving pharmaceutical product through the FDA.

ical agent training specialist, sought legal advice from a district attorney and county counsel, *inter alia*, reviewed applicable case-law[7] and OC research material, and discussed the proposed use with other law enforcement agencies.[8]

Plaintiffs and an entity entitled "Headwaters Forest Defense" filed a complaint in federal District Court under 42 U.S.C. §1983, alleging violations of their First and Fourth Amendment rights, and requesting injunctive relief to prohibit the use of OC by Humboldt County law enforcement on environmental activists engaged in various violations of the law. Plaintiffs' complaint named as defendants the County of Humboldt, the City of Eureka, Humboldt County Sheriff Dennis Lewis, Eureka Police Chief Arnold Millsap, Humboldt County Chief Deputy Gary Philp, Eureka Police Captain William Honsal, and other members of the Humboldt County Sheriff's Departmental and the Eureka Police Department. Punitive damages were sought against each individual defendant.[9]

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[7] One of the cases reviewed by Chief Deputy Philp was the Ninth Circuit's leading case concerning the use of pain compliance to effect lawful arrests of activists – *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994). In *Forrester*, anti-abortion protesters occupied the hallways of a health clinic and went limp when officers attempted to remove them. The officers then used martial arts devices ("nonchakus") on the wrists of the activists, several of whom suffered lasting physical injury, from tendon damage to a broken wrist. The Ninth Circuit upheld a jury determination that this use of force was reasonable.

[8] The reviewed materials included a 1997 National Institute of Justice report finding no injuries from the use of OC, in spite of the fact that it was used at a distance of less than two feet about twenty-five percent of the time by law enforcement officers in the field.

[9] Following the filing of the complaint and prior to trial, the court denied plaintiffs' application for injunctive relief. Headwaters Forest Defense requested and was granted dismissal from

[footnote continued]

Following a motion for summary judgment by defendants, all individual defendants were dismissed from the lawsuit based on qualified immunity, with the exception of Humboldt County Sheriff Dennis Lewis and Chief Deputy Gary Philp. The County of Humboldt and the City of Eureka were denied summary judgment.

Trial commenced in San Francisco on August 10, 1998. A jury heard nine days of testimony, including testimony from the plaintiffs, law enforcement officers, and one expert witness regarding the use of OC to overcome resistance to arrest.

At the close of plaintiffs' evidence, the District Court dismissed the two remaining individual defendants, Chief Deputy Gary Philp and Humboldt County Sheriff Dennis Lewis, on qualified immunity grounds.

After deliberation, the jury announced that it was deadlocked, and the court declared a mistrial. Following the mistrial, defendants moved for entry of judgment as a matter of law under Federal Rules of Civil Procedure, Rule 50. The court applied the balancing test in *Graham v. Connor,* 490 U.S. 386 (1989), and concluded: "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs." App., *infra,* 46a.

Plaintiffs appealed the District Court's judgment on the Fourth Amendment issue, as well as the granting of qualified immunity to Sheriff Lewis and Chief Deputy Philp.

The Ninth Circuit reversed in full the decision of the District Court. The court concluded that the threshold

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the suit, and plaintiffs dismissed all First Amendment claims and allegations of unlawful detention with prejudice, and dismissed all claims against several individually named defendants.

Fourth Amendment issue was a jury question, viewing the evidence at trial in a light most favorable to the plaintiffs. The court rejected the notion that proof of a physical injury or risk of physical injury, is a prerequisite to a viable excessive force claim. The Panel declared that the District Court "erred in focusing on the purported absence of evidence of a 'significant risk of physical injury' from the use of pepper spray." App., *infra*, 20a. The Panel also rejected the notion that a significant governmental interest justified the use of pepper spray, distinguishing this Court's holding in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) ("The wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of a state to maintain order and preserve the rights of its citizens."). *Id.* at 287.

The court also concluded that Sheriff Lewis and Chief Deputy Philp were not entitled to qualified immunity. Following a "two-prong" inquiry mandated by Ninth Circuit precedent, the court first declared that "the law concerning the use of excessive force is clearly established," – even though its application in the particular factual context was "unprecedented" because "the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment are well established." App., *infra*, 34a. Turning to the "second prong" of the inquiry, the court held that disputed "historical facts" precluded a determination that the use of force in question was objectively reasonable as a matter of law. *Id.* at 36a.

REASONS FOR GRANTING THE PETITION

The issue is as simple as whether law enforcement officers may enforce the laws of the jurisdiction each serves or should be unwilling participants in the theatre of civil disobedience. Stated another way: Are the federal courts of this land to become political forums under the guise of Section 1983 actions?[10] The decision of the Ninth Circuit challenged here suggests that *any* use of force to overcome resistance to lawful arrest of groups engaged in civil disobedience and organized resistance, exposes law enforcement to civil liability, and qualified immunity can never apply in excessive force cases.[11] Indeed, without providing any guidance as to what should be offered or how to conduct negotiations with those who refuse to be engaged in conversation, the Ninth Circuit opinion requires a jury to speculate about such matters in each case.[12]

The *de minimis* nature of the force used to accomplish the arrests in this case and the absence of any injury to any plaintiff would foreclose any civil action in many circuits.[13] The issue is one of vital importance to law

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[10] One of the plaintiffs was so bold as to testify that pepper spray was "good stuff" because it brought media attention to their cause. And yet another plaintiff admitted that he was feeding evidence to a local television station during the trial. The record with respect to plaintiffs' request for a temporary restraining order reflects that defendants were served in this action only after plaintiffs issued a press release and defense counsel was informed of the first hearing date by a *San Francisco Chronicle* reporter.

[11] App., *infra*, 17a.

[12] See videotape of interview of Spring Lundberg (lodged with the Court) given within hours of the Scotia event, confirming that the protesters chose to sing rather than communicate with law enforcement officers and that her commitment was to not walk voluntarily from the offices at Scotia.

[13] *See* case cited *infra*, pp. 13-17.

enforcement throughout the country as departments from various jurisdictions are required to respond to protest events and discharge their sworn duties in a manner properly limited by the bounds of the Constitution, while overcoming resistance to arrest by activists using means limited only by the bounds of their imagination.[14]

It is undisputed in this case that all plaintiffs were subject to arrest as a matter of law, all resisted arrest as a matter of law, and all were taken into custody without injury. Plaintiffs developed, fabricated and employed devices to resist arrest from which plaintiffs could release at any time, but could only be physically removed by law enforcement through use of a power tool with a grinding wheel capable of cutting steel. Lower ranking officers charged with the duty of accomplishing this task expressed concern that the devices used by protestors were becoming sturdier and the risks of injury to the arrestees and law enforcement officers were increasing such that it was not a matter *if* someone was going to be seriously injured, but *when*. Policy makers for the Humboldt County Sheriff's Department responded to these concerns by researching the tactical use of a chemical agent to overcome resistance to arrest and authorized this as within the use of force policy of the Department. The arrests were accomplished through the tactical application of a chemical agent – the level of force which falls just above "verbal command" and below "hands on" compliance techniques in use of force policies adopted by law enforcement departments throughout this nation.

Indeed, the Commission of Police Officer Standards and Training, ("P.O.S.T."), which oversees and sets standards for training and hiring practices of all law enforcement agencies in the State of California, embraced the

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[14] *See* App., *infra*, 53a, showing the evolution of the devices used to resist arrest.

manner of application in these incidents in training guidelines promulgated for civil disobedience responses.[15] No force was used prior to urging voluntary compliance with the lawful orders and no force was used once the lawful arrests were effected.

The requirement of the Ninth Circuit that the reasonableness of such force be judged by a jury, with evaluation of the potential for "negotiation" with those committed to resisting arrest is patently unreasonable and makes law enforcement, in the context of civil disobedience, impossible. Moreover, under its published decision, any use of force to effect a lawful arrest exposes the officer to civil liability because the Ninth Circuit requires evaluation of the "clearly established" prong as generic "excessive force" without regard to the actual particulars or context – denying qualified immunity as a defense short of trial by jury. This is contrary to the majority view among the circuits and violates the spirit of this Court's holding in *Anderson v. Creighton*, 483 U.S. 635 (1987).[16]

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[15]The Ninth Circuit panel references a comment (App., *infra*, 6a) by the then Attorney General of California, from a letter that he authorized at the height of the media frenzy surrounding this matter, while engaged in his own gubernatorial race. It fails to note that this spawned a study by the P.O.S.T. Use of Force Committee with the result indicated above.

[16]Thus, not only does the decision of the Ninth Circuit severely limit available options of law enforcement developed to avoid injury to those being arrested and to the officer responding to increasingly volatile and organized acts of civil disobedience, law enforcement policymakers are denied qualified immunity, even if a district court judge, hearing all of the best evidence plaintiffs can muster and viewing videotapes of the use of force in issue, finds the use of force reasonable as a matter of law, the State Commission on law enforcement standards and training concurs (*see* fn. 15), and *no* law enforcement officer opines that the use of force in issue is unreasonable.

1. The decision below has far-reaching implications concerning the accepted constitutional parameters of an excessive force claim.

The District Court applied the balancing test established by this Court in *Graham* and concluded that: "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs." App., *infra*, 46a.

The District Court had concluded that the absence of any physical injury, or evidence of risk of physical injury concerning the subject use of OC was a significant factor in determining whether the force used was reasonable under the *Graham* analysis:

> . . . the severity of the intrusion upon the arrestee's personal integrity was minimal. The officers did not threaten or use deadly force or even employ a significant level of physical force. Rather, the force used was merely the infliction of transient pain without significant risk of physical injury. In fact, plaintiffs failed to introduce any evidence that the use of cotton swabs to apply OC posed any risk of injury.[17]

The Ninth Circuit rejected this reasoning, stating that "the District Court erred in focusing on the purported absence of evidence of a 'significant risk of physical injury' from the use of pepper spray." App., *infra*, 20a. The court determined that Fourth Amendment jurisprudence is "well settled" that a plaintiff may recover "nominal damages without proof of actual injury" on a claim of excessive force. *Id.*

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[17] App., *infra*, 46a-47a.

Thus, the Ninth Circuit opinion stands for the proposition that force which requires no "hands on" contact between the officer and the arrestee and which involves no physical injury or even risk of physical injury to the arrestee, may be found to be unreasonable under the Fourth Amendment.

The Ninth Circuit is at odds with the decisions of this Court and other circuits.

This Court "has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. " 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) "violates the Fourth Amendment." *Graham*, 490 U.S. at 396.

A substantial number of lower courts have concluded that instances of minimal force that do not result in actual or significant injury do not state a Fourth Amendment excessive force violation. In *Foster v. Metropolitan Airport Comm'n*, 94 F.2d 1076 (8th Cir. 1990), the Eighth Circuit held that the officers' use of force after they successfully pulled the plaintiff from the car did not give rise to a constitutional claim of excessive force under the Fourth Amendment, even though the plaintiff testified that he was pushed against a wall twice on the way to the holding area, given his further testimony that he sustained no injury as a result of being pushed. Similarly, in *Randles v. Gregart*, 965 F.2d 90 (6th Cir. 1992), the Sixth Circuit held that the modest force exerted, which resulted in no injury, was objectively reasonable. In that case, plaintiff had refused to give deputies his gun, which he was using to hunt illegally on his property. Lack of injury may be an important factor even when

deadly force is threatened. In *Sharrar v. Felsing,* 128 F.3d 810, 821 (3d Cir. 1997), police officers required the arrestees to lie face down in the dirt, with guns to their heads, and made threats. The court held that even though these actions caused discomfort and humiliation, they were still objectively reasonable. *Id. See also, Wilson v. Williams,* 83 F.3d 870 (7th Cir. 1996) (in due process case, proper for jury to consider extent of injury, need to apply force, relationship between force used and need for force, threat reasonably perceived by official, and efforts made to temper severity of a forceful response); *Joos v. Ratliff,* 97 F.3d 1125, 1126 (8th Cir. 1996) (per curiam) ("*de minimis*" amount of force in effecting an arrest would be insufficient to create a constitutional issue); *Lester v. Chicago,* 830 F.2d 706, 714 (7th Cir. 1987) (pre-*Graham* case holding that plaintiff failed to state a Fourth Amendment excessive force claim when, during course of arrest for disturbing peace, plaintiff was kneed in the back, threatened with being struck, dragged down a hallway, and handcuffed tightly, causing bruises on her wrists); *Azeem v. Town of Bethel,* 2000 WL 1838329 (D. Conn., Sept. 27, 2000) (recognizing the importance of some injury to arrestee in an excessive force case).

While most courts recognize the relevance of the amount of force used and degree of injury, the Eleventh Circuit has adopted a *per se* rule that application of *de minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment. *See Nolan v. Isbell,* 207 F.3d 1253 (11th Cir. 2000).

The Fifth Circuit requires a plaintiff asserting an excessive force claim to have "suffered at least some form of injury," *Jackson v. R.E. Culbertson,* 984 F.2d

699, 700 (5th Cir. 1993), even though that court acknowledges its "significant injury" standard was abrogated by *Hudson v. McMillian*, 503 U.S. 1 (1992), an Eighth Amendment case. "[T]he amount of injury necessary to satisfy our requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

Other courts have held that, at a minimum, officers are entitled to qualified immunity under the principle of *de minimis* or minimal use of force involving no physical injury to the plaintiff. In *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), the plaintiff, arrested for disorderly conduct, was placed in handcuffs and then complained that the officer had applied them too tightly and had refused to loosen them, causing the plaintiff pain, but only minor skin abrasions for which no medical treatment was sought: "[t]he minor nature of this injury reflects that minimal force was used to apply the handcuffs. Certainly these circumstances would not 'inevitably lead' a reasonable officer in the officers' position to conclude that the force used to apply the handcuffs was unlawful." *Id.* at 1446-1447. In *Jones v. City of Dothan*, 121 F.3d 1456 (11th Cir. 1997), the officer slammed the plaintiff against the wall, kicked his legs apart – causing pain in an arthritic knee, requiring him to raise his arms above his head – which caused pain due to a prior stroke, and pulled his wallet from his pants. *Id., at 1460.* "While the use of force . . . may have been unnecessary, the actual force used and the injury inflicted were both minor in nature." *Id.* at 1460-1461.

In *Williams v. Bramer,* 180 F.3d 699 (5th Cir. 1999), the plaintiff alleged that the officers violated his Fourth Amendment rights by choking him while conducting a search of his mouth to find drugs and then choking him again when he complained about the first choking. In reversing a District Court finding of qualified immunity on the second choking, the court upheld qualified immunity on the first choking, because of a lack of injury, stating:

> [W]e do require a plaintiff asserting an excessive force claim to have "suffered at least some form of injury" [citation omitted]. Furthermore, we have shaped our analysis so that we do not permit a cause of action for every contact between a citizen and a police officer: in just about every conceivable situation, some amount of force or contact would be too nominal to constitute a constitutional violation. When the force used is insufficient to satisfy the legal standard necessary for recovery, the amount of force is *de minimis* for constitutional purposes [citation omitted]. 108 F.3d at 703-704.

In another minimal force case, *Lennon v. Miller,* 66 F.3d 416 (2d Cir. 1995), the defendant officer asked the plaintiff to get out of her car, but she remained in the driver's seat and refused to move. The officer arrested her, pulled her hand off the ignition, placed his arm around her neck, shoulder, right arm, and forcibly removed her from the car. The only injury was to plaintiff's right wrist, for which she was treated in a hospital (however, there was no information pled as to the extent of her injuries). The Second Circuit affirmed summary judgment for the officer on qualified immunity grounds, based on the amount of force used. "[N]o rational jury could have found that the force used was so excessive

that no reasonable officer would have made the same choice . . . The intrusion on [plaintiff's] Fourth Amendment rights, if any, was extremely limited. It was objectively reasonable for [the officer] to believe that in pulling plaintiff from the car to effect her arrest, he was not infringing on her Fourth Amendment rights. Under the circumstances described above, no jury could find that it was objectively unreasonable for the officers to believe that the force used to remove [plaintiff] from the car was not excessive." 66 F.3d at 426.

2. The decision below will also have far-reaching implications concerning the availability of qualified immunity in a case alleging excessive force. By holding that "the law concerning the use of excessive force is clearly established" regardless of the factual context in which the force is used, qualified immunity, for all practical purposes, is eliminated.

In November, 2000, this court granted certiorari to review the Ninth Circuit's decision in *Katz v. U.S.*, 194 F.3d 962 (9th Cir. 1999). The issue in *Katz* was the availability of qualified immunity to law enforcement officers in cases alleging use of excessive force. In that decision, the Ninth Circuit held that the existence of a jury question on the issue of whether the force used was reasonable under the Fourth Amendment precludes a finding of 'objective reasonableness' for purposes of qualified immunity. *Katz* left open the possibility that an officer could still be entitled to qualified immunity in an excessive force case if no "clearly established" law put the officer on notice that the particular use of force was unconstitutional. *Id., at 970.* ("A defendant will always be entitled to qualified immunity when the law governing his or her conduct was not clearly established – the first prong of the qualified immunity

defense.") The availability of qualified immunity on this basis is now foreclosed with the court's decision in *Headwaters,* where the court holds that the law is *always* "clearly established" with respect to the use of force – regardless of the particular use of force involved. Thus, with *Headwaters,* the barrier of qualified immunity in an excessive force case has been completely dismantled. The effect of the *Headwaters* opinion is simply that every excessive force case will always go to trial, regardless of this Court's concerns expressed in *Hunter v. Bryant,* 502 U.S. 224 (1991). Moreover, the decision will undoubtedly effect a limitation on the use of OC by law enforcement, increasing the risk of injury to the officers and those being arrested while engaged in increasingly militant civil disobedience.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), this court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity inquiry is an objective one. Immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions were unconstitutional. *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Thus, "if officers of reasonable competence could disagree" on the lawfulness of the conduct, "immunity should be recognized." *Id.*

In *Anderson v. Creighton,* 483 U.S. 635, 639 (1987), this Court clarified that immunity may not be denied simply because "the relevant 'legal rule' " was "clearly established" at a high "level of generality." This approach would convert qualified immunity into "a rule of virtually unqualified liability simply by alleging violation of

extremely abstract rights." *Id.* Thus, the Court explained, it is not enough to show that the right to be free from unreasonable searches and seizures was "clearly established," or that the applicable legal standard or formula had been settled by the courts. *Ibid.* To the contrary:

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[18]

Id., at 640. (emphasis added).

In *Anderson,* this Court then criticized the Eighth Circuit's failure to undertake a fact-specific approach to qualified immunity:

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances – was clearly established. The Court of Appeals specifically refused to consider the argument

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[18] As discussed in more detail below, it is worth noting here that before approving the OC option, Chief Deputy Philp reviewed the leading Ninth Circuit case involving the arrest of truly passive (unlike plaintiffs here, who resisted by using metal sleeves) protesters, which affirmed a verdict in favor of officers using nunchakus that caused serious injury. *Forrester v. City of San Diego,* cited *supra,* fn. 7.

> that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances . . . [t]his refusal was erroneous.

Id., at 640-641.

Following *Anderson*, this Court emphasized the importance of qualified immunity in *Hunter v. Bryant*, 502 U.S. 224, 229 (1991), where it reversed the Ninth Circuit and pointed out that "the entitlement is an immunity from suit rather than a mere defense to liability," and cited a history of previous decisions where it has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.*, at 227. Thus, the qualified immunity standard "gives ample room for mistake in judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.*, at 229.

More recently, this Court addressed the 'clearly established' immunity standard in *United States v. Lanier*, 520 U.S. 259 (1997). In that case, the Sixth Circuit overturned a defendant's conviction for violating 18 U.S.C. §242, the criminal counterpart of section 1983. The court explained: "[T]he object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying section 242 . . . the qualified immunity standard is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.*, at 264.

It is this notion of 'fair warning' which is at the heart of the 'clearly established' requirement. As observed by the Fourth Circuit in *Pinder v. Johnson*, 54 F.3d 1169,

1173 (4th Cir. 1995) "The purpose of [the qualified immunity] doctrine is to ensure that police officers and other government actors have notice of the extent of constitutional restrictions on their behavior. Thus, qualified immunity prevents officials from being blindsided by liability derived from newly invented rights or [ ] unforeseen applications of pre-existing rights."

a. Ignoring all of the above precedent, the Ninth Circuit in *Headwaters* simply proclaims that "the law concerning use of excessive force is clearly established." App., *infra*, at 34a. Thus, *Headwaters* instructs that there is no 'clearly established' inquiry in an excessive force case, because the law is always 'clearly established' – regardless of the particular factual context.

Under *Headwaters*, the 'fair warning' aspect of qualified immunity is eliminated. Declaring that "the use of excessive force is clearly established" provides no warning – fair or otherwise – to law enforcement officers or officials formulating use of force policies. Rather, "to say that the use of constitutionally excessive force violates a clearly established right . . . begs the open question whether the particular degree of force under the particular circumstances was excessive." *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990).

Furthermore, combined with the holding in *Katz*, *Headwaters* eliminates qualified immunity for all practical purposes in an excessive force case. Once the court finds a triable issue of fact on the threshold constitutional issue, no further inquiry is required and summary adjudication must be denied. Under *Katz*, disputed issues of fact on the constitutional question eliminates the possibility of a finding of "objective reasonableness." Under

Headwaters, the mere fact that plaintiffs are asserting an excessive force claim eliminates the possibility that the law was not "clearly established." The Ninth Circuit's two prong inquiry is rendered meaningless, as is qualified immunity.

The particular facts in *Headwaters* highlight the significance of the 'clearly established' requirement and the gravity of the Ninth Circuit's holding. Prior to adopting the OC alternative, the undisputed evidence established that law enforcement officials consulted with a district attorney, a deputy district attorney, county counsel, a county risk manager, read professional studies concerning the use of OC and reviewed applicable case law involving the tactical use of force to overcome resistance to arrest. At the time of the incidents, the controlling authority on the use of force on noncompliant activists in the Ninth Circuit was *Forrester v. City of San Diego,* 25 F.3d 804 (9th Cir. 1994). In *Forrester,* the plaintiffs suffered lasting physical injury from tendon damage to a broken wrist, following the use of nonchakus (a martial arts device) by arresting officers. *Id.,* at 814. The plaintiffs in *Forrester* were true "passive resisters" – that is, they resisted arrest simply by going limp. Under those facts, the Ninth Circuit applied the factors announced in *Graham v. Connor,* 490 U.S. 386, and held that the use of the pain compliance devices did not constitute unreasonable force.

The decision to use pepper spray was also consistent with more specific authority outside of the Ninth Circuit. As observed by the District Court in granting judgment as a matter of law: "Several courts have specifically held that the use of OC as a pain compliance instrument, rather than a means of subduing an attacking or violent suspect, is reasonable as a matter of law"

citing Monday v. Oullett, 118 F.3d 1099 (6th Cir. 1997) [full burst of pepper spray to face of non-compliant and non-combatitive plaintiff to avoid risk of injury and further delay "did not constitute excessive force" as a matter of law]; *Bennett v. Cambra,* 1997 WL 88329 (N.D. Cal.) [repeated use of pepper spray on inmate refusing to move from a cell reasonable as a matter of law]; *United States v. Holloway,* 906 F. Supp. 1437 (D. Kan. 1995) [directing full stream of pepper spray into face when officer believed suspect was about to swallow contraband reasonable as a matter of law]; *Passino v. State of New York,* 175 Misc.2d 733, 669, N.Y.S.2d 793 (Court of Claims 1998).

Law enforcement officials also had the benefit of a 1997 National Institute of Justice report on the use of OC, which documented no injuries from the use of OC. It was also undisputed that officials consulted with a chemical agent training specialist, who confirmed no significant health risks associated with OC, and that its effects are limited to short-term discomfort and irritation.[19]

In other words, defendants here did everything they were encouraged to do by the courts: reviewed the particular use of force in light of current case law, regulations, and legal opinion to establish that no 'clearly established' law was being violated. Consistent with its approach that "the law concerning the use of excessive

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[19]This is confirmed by a viewing of the videotape interview of plaintiff "Spring" Lundberg taken shortly after the application of OC. As seen in the videotape, there are no indications that Ms. Lundberg was suffering any ill-effects whatsoever at the time of the interview.

force is clearly established," the Ninth Circuit opinion failed to address a single case, statute, or regulation in reversing the District Court's grant of qualified immunity.

The import of its holding that the applicable law is always 'clearly established' is further magnified when one considers that a District Court judge concluded that the force used was reasonable as a matter of law, and one member of the Ninth Circuit panel conceded in a concurring opinion that: "This is a close case."[20]

Qualified immunity serves the critically important function for law enforcement of allowing officers to act in reasonable good faith without having to worry that courts later will dissect their decisions and conclude that there was a better course of action than the one chosen. A police officer's effective and safe discharge of his or her duties often depends on the ability to take reasonable steps to exert control of an arrest situation "with independence and without fear of consequences." *Harlow*, 457 U.S. at 819.

The opinion below undermines, if not eliminates, the doctrine of qualified immunity by holding that the use of excessive force is always clearly established, regardless of the particular facts and circumstances confronting the officers.[21]

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[20] In other words, a "close call" as to whether the force was reasonable *as a matter of law* – something far above the *no reasonable officer* standard. This concurring opinion was stricken from the Ninth Circuit's amended opinion.

[21] Indeed, *Headwaters* has already been cited for the proposition that "the law regarding the use of excessive force was clearly established at the time of the events at issue," resulting in denial of qualified immunity. *Clavette v. Sweeney*, 132 F.Supp.2d 864, 2001 WL 208517 (D. Or., Jan. 30, 2001).

This court in *Malley v. Briggs*, 475 U.S. 335 (1986) announced that: "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the action was lawful]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.*, at 341. Here, a District Court judge has concluded that the use of force in question is constitutionally valid, and one of the three panel members in the Ninth Circuit declared the constitutional question a "close call."

b. Granting review will also permit resolution of a conflict among the circuits concerning application of the 'clearly established' standard for qualified immunity in excessive force cases.

The majority of courts, following *Anderson v. Creighton*, now approach the 'clearly established law' inquiry at a fairly fact-specific level.[22] *See, e.g., Vathekan v. Prince George's County*, 154 F.3d 173, 179 (4th Cir. 1998). *Vathekan* (framing the qualified immunity as the "Fourth Amendment right to be free from excessive force in the course of a Fourth Amendment seizure brought about by a police dog that was deployed without a verbal warning"); *McCall v. Williams*, 52 F.Supp.2d 611, 620 (D.S.C. 1999) ("This court must follow the Fourth Circuit's lead, and frame the right in this case at the appropriate level of factual specificity. Instead of simply the right to be

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[22] At least one authoritative source on the issue opines that the 'clearly settled law' inquiry *must* be made at a fact-specific level following this Court's decision in *Anderson v. Creighton*. *See* Nahmod, *Civil Rights and Civil Liberties Litigation, The Law of Section 1983* (4th ed.), §8:18.

free from the use of excessive force, the right may be defined as a person's Fourth Amendment right to be free from the use of excessive force by law enforcement officers *in tightly handcuffing a suspect* to effect an arrest or during an investigatory stop."); *Jones v. Webb*, 45 F.3d 178, 183 (7th Cir. 1995) (Qualified immunity in an excessive force case as distinguished from the Fourth Amendment issue requires "a higher level of specificity."); *Maltby v. Winston*, 36 F.3d 548, 554 (7th Cir. 1994) ("In order for the plaintiff to prevail, it is not enough to recite a well-known constitutional principle and state that the actions taken by the officer violated that principle."); *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990) (In an excessive force case: "The facts and circumstances of each case must be examined to determine whether 'the contours of the right . . . are sufficiently clear that a reasonable official would understand that what he is doing violates that right' . . ." *citing Anderson*, 483 U.S. at 640.); *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989) (For a plaintiff to overcome qualified immunity in an excessive force case, he or she must show "that no police officer could have misunderstood that [defendant's] particular actions which caused [plaintiff's] injuries violated federal law.").

On the other hand, courts in at least two other circuits have also held that the right to be free from excessive force, as defined by the reasonableness test of *Graham*, is clearly established. *See, Wilson v. Meeks*, 52 F.3d 1547, 1552 (10th Cir. 1995) [stating that "[t]his court has held the reasonableness standard is 'clearly established' for purposes of section 1983 actions"]; *Tofano v. Reidel*, 61 F.Supp.2d 289, 299 (D.N.J. 1999) ["[t]he right to be free from excessive force and unreasonable seizure [is] clearly established[ ]"]; *Lloyd v. Jefferson*, 53 F.Supp.2d 643, 679 (D. Del. 1999) [holding that

"[i]ndeed, there can be no doubt that 'the individual' possessed a clearly established right to be free from unreasonable seizure and excessive force" [and at the time of the incident "it was clearly established Third Circuit law that the objective reasonableness standard be applied to conduct allegedly violative of the Fourth Amendment"]; *Wiers v. Barnes*, 925 F.Supp. 1079, 1087 (D. Del. 1996) [stating that the law in the area of excessive force, namely objective reasonableness, is clearly established in the Third Circuit].

CONCLUSION

For all the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEADWATERS FOREST DEFENSE,
Plaintiff,

and

MOLLY BURTON; VERNELL "SPRING" M. LUNDBERG; MICHAEL MCCURDY; ERIC SAMUEL NEUWIRTH; MAYA PORTUGAL; LISA MARIE SANDERSON-FOX; JENNIFER SCHNEIDER; TERRI SLANETZ; NOEL TENDICK,
Plaintiffs-Appellants,

v.

THE COUNTY OF HUMBOLDT, a political subdivision of the State of California; HUMBOLDT COUNTY SHERIFF'S DEPARTMENT; DENNIS LEWIS, Sheriff; GARY PHILP, Chief Deputy; MARVIN KIRKPATRICK, Deputy; JOHN SYLVIA, Deputy; CIARBELLINI, Sgt.; CITY OF EUREKA, a political division of the State of California; EUREKA POLICE DEPT; BILL HONSAL, Captain; JAMES MANOS, Sgt.,
Defendants-Appellees.

No. 98-17250

D.C. No. CV-97-03989-VRW

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

BEST AVAILABLE COPY

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
December 6, 1999—San Francisco, California

Filed May 4, 2000
Amended January 31, 2001

Before: Myron H. Bright,[1] Harry Pregerson, and
William A. Fletcher, Circuit Judges.

Opinion by Judge Harry Pregerson

COUNSEL

Mark Hughes, Denver, Colorado, for the plaintiffs-appellants.

Nancy K. Delaney, Eureka, California, for the defendants-appellees.

Margaret C. Crosby, for amicus curiae American Civil Liberties Union Foundation of Northern California.

ORDER

With the filing of the Amended Opinion, the panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Pregerson and W. Fletcher voted to deny the suggestion for rehearing en banc and Judge Bright so recommended said rejection.

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[1]The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PREGERSON, Circuit Judge:

Nine environmental activists, along with an entity called Headwaters Forest Defense, brought this action under 42 U.S.C. § 1983, alleging that the use of pepper spray on the activists during three protests in Humboldt County constituted excessive and unreasonable force in violation of their Fourth Amendment rights. The named defendants included Humboldt County and its Sheriff's Department; Humboldt County Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, who authorized the use of pepper spray; the City of Eureka and its Police Department; as well as each law enforcement officer who participated in the protesters' arrests. The district court granted summary judgment on qualified immunity grounds in favor of all individual defendants, except for Sheriff Lewis and Chief Deputy Sheriff Philp.[2] A jury trial in this

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[2]To succeed in their § 1983 claims against Humboldt County, the City of Eureka, and their respective police departments, plaintiffs have to establish that: (1) the police used excessive and therefore unconstitutional force in arresting the protesters; and (2) a policy or practice of the municipalities' police departments "cause[d]" or was " 'the moving force' behind" the unconstitutional arrests. *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994) (quoting *Monell v. Department of Social Servs. of City of New York*, 436 U.S. 658, 694 (1978)). The offending "policy" may be established by "a first-time decision to adopt a particular course of action [when that action] is directed by a governmentally authorized decisionmaker," such as the chief of police. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481

case consumed nine days. At the close of plaintiffs' case-in-chief, the district court ruled that Lewis and Philp were also entitled to qualified immunity as a matter of law and dismissed the case against them. After deliberating for six hours on the remaining claims, the jury announced that it was irreconcilably deadlocked. The district court declared a mistrial and set a new trial date. But eight weeks later, the district court reversed itself and granted defendants' motion for judgment as a matter of law.

Plaintiffs contend on appeal that the district court erred in ruling that Sheriff Lewis and Chief Deputy Sheriff Philp were entitled to qualified immunity as a matter of law because historical facts were in dispute and that the court erred in directing a verdict in favor of the remaining defendants. We agree.

I.

FACTUAL BACKGROUND

In the fall of 1997, environmental activists staged three nonviolent protests against what they perceived to be the unnecessary logging of ancient redwood trees in the Headwaters Forest along California's northern coast. During each protest, two to seven protesters linked themselves together using self-releasing lock-down devices known as "black bears." A "black bear" is a ten to twenty-five pound steel cylinder (about one-fourth of an inch thick) with a rod or post welded into the center. The protesters placed their arms into the steel

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(1986)). To succeed in their individual claims against Sheriff Lewis and Chief Deputy Sheriff Philp, plaintiffs must establish that these defendants "set in motion" the acts committed by the arresting officers and that these defendants "knew or reasonably should have known" that such acts would cause constitutional injury, or that these defendants failed "in the training, supervision, or control" of these officers in the proper use of pepper spray to effect an arrest. *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (quoting *Larez*, 946 F.2d at 646).

cylinders and attached steel bracelets worn around their wrists to the center rods or posts in the "black bears" by using mountain climbers' carabiners. Each "black bear" linked two protesters together. When in place, the devices completely immobilized their arms and prevented their separation. By simply using their hands to unclip the carabiners on the inside of the cylinder, the protesters could disengage themselves from the devices. If the protesters did not voluntarily agree to release themselves, the lock-down devices made it difficult, but not impossible, for law enforcement officers to take the protesters into custody upon arrest. To forcibly remove "black bears," the officers had to use a Makita grinder. A Makita grinder is a hand-held electric grinder that can cut through steel.

The protesters' use of these lock-down devices is at the heart of this case. Since 1990, nonviolent environmental activists had on many previous occasions used these and other mechanical devices to link themselves physically together during similar protests in Humboldt County. Over the years, the devices became increasingly sturdy and more difficult for the police to remove forcibly. The initial devices were bicycle locks or lightweight metal cylinders, weighing less than five pounds. By 1995, they had evolved into the "black bears" that were used here.

In 1997, the Humboldt County Sheriff's Department organized a special response team comprised of Special Services Deputies to deal with the environmental protests. The officers selected for the team were those with special training and experience in the use of a Makita grinder to remove lock-down devices safely. By the fall of 1997, one of the officers had used a Makita grinder to remove hundreds of lock-down devices from the arms of environmental protesters. He had done so safely, without causing injuries to either himself or the protesters.

Nevertheless, because a Makita grinder generates sparks when used, the defendants claim to have had a growing con-

cern about the danger involved in using it. So, in the summer of 1997, the Humboldt County Sheriff's Department explored alternatives for effecting the arrest of environmental protesters in lock-down devices — including the use of oleoresin capsicum aerosol ("OC" or "pepper spray"). Defendants Lewis and Philp consulted a certified trainer in the use of pepper spray, the county's risk manager, and its district attorney. And they read much of the available literature on the subject. By summer's end, defendants concluded that the use of a lock-down device by *any* protester — even an otherwise nonviolent protester who posed no danger to the public, himself, or the arresting officers — constituted "active resistance" to arrest, warranting police use of pepper spray as a "pain compliance technique."

But, according to then-California Attorney General Dan Lungren, the use of pepper spray under these circumstances was unprecedented; its use had been previously "limited to controlling hostile or violent subjects." Even Sheriff Lewis conceded at trial that no law enforcement officer in Humboldt County, the State of California, or anywhere in the nation had ever used pepper spray on nonviolent protesters as it was used in this case. The defendants nonetheless contend, and the district court found as a matter of law, that the officers' use of pepper spray during the three protests at issue here was reasonable and appropriate under the circumstances.

A. The Scotia Protest

The first protest took place on September 27, 1997, at the headquarters of the Pacific Lumber Company in Scotia, California ("the Scotia protest"). During the Scotia protest, plaintiffs Vernell "Spring" Lundberg (a minor at the time), Jennifer Schneider, Molly Burton, and Eric "Sam" Neuwirth, along with three others, ran into the Pacific Lumber Company lobby, sat down in a circle, and locked themselves together using the "black bears." Meanwhile, other activists held a peaceful rally (including folk music and protest songs) and a

mock trial of the owner of Pacific Lumber Company on the sidewalk in front of the Pacific Lumber Company building. Still other activists hung protest signs from the roof of the Pacific Lumber building.

Pacific Coast Lumber employees called the Humboldt County Sheriff's Department, which dispatched its special response team. Upon arrival, the officers observed that the seven protesters had placed the "black bears" under their arms and legs, making it particularly difficult to use a grinder to remove them. The officer in charge decided that using pepper spray was the most appropriate and safest way to arrest the trespassing protesters. He and the other officers testified that they made this decision solely because of the difficulty in using a grinder in these circumstances. It was "immaterial" to them that the protesters were peacefully engaged in an act of civil disobedience, as opposed to being violent. And the protesters outside the building were not a factor in their decision to use the pepper spray on those inside the building. Indeed, it is undisputed that the protesters both on the roof and outside the building were nonviolent, did not interfere with ingress or egress to and from the Pacific Lumber building, posed no safety risks to the public or to the officers, and willingly dispersed when their rally and mock trial were ended or when the police directed them to do so.

The Sheriff's videotape of the incident reveals that the officers never attempted to negotiate with the protesters. Once they made the decision to use the pepper spray, the officers simply warned the protesters repeatedly that if they refused to release themselves from the "black bears" the officers would apply pepper spray to their faces. The protesters tucked their heads into their chests and refused to release. The officers then forced four protesters' heads back and applied pepper spray with a Q-tip to the corners of their closed eyes. The protesters screamed in pain. The three other protesters, including one who announced that she had asthma, then voluntarily released. The officers put plastic handcuffs on these three pro-

testers and placed them on the couch right next to those still protesting. They remained there for more than an hour, cheering on the others who continued protesting and excoriating the officers for using pepper spray on them. At this point, the officers did not offer to flush out the protesters' eyes with water.

The four protesters who remained in the lock-down devices were seated in sets of two. The circle of human legs and arms had been broken. Nevertheless, the officers reapplied the pepper spray with Q-tips to the protesters' eyelids. The protesters still did not release. Twenty minutes after the pepper spray was first applied and six minutes after its second application, the officers sprayed water into the eyes of the protesters to dilute the OC, continuing to do so periodically for more than an hour. Thereafter, the officers escorted the three protesters who were never pepper sprayed out of the building and carried the two pairs of remaining protesters out of the building on stretchers. It took two officers just three minutes to carry each of the two pairs of protesters out of the building; a few other officers present opened doors and directed their movement. The officers appeared to have no trouble lifting and carrying the protesters out. Once outside the building, one pair of protesters voluntarily released themselves. A Makita grinder was used to extricate the other pair from the "black bears." It took ten minutes to remove the device by grinder. The officers threw a fire blanket over the protesters to protect them from the sparks generated by the grinder's use.

B. The Bear Creek Protest

The second protest took place on October 3, 1997, when two pairs of protesters, including plaintiffs Michael McCurdy and Noel Tendick, using "black bears" locked themselves to two Pacific Lumber Company bulldozers at a remote logging site on Pacific Lumber Company property (the "Bear Creek protest"). Again the special response team was called to the scene. The same officer in charge at the Scotia protest was in

charge at Bear Creek. He testified that he told the protesters that the officers were going to use pepper spray on them if they didn't release because "we're getting out of here quicker that way." He also testified to his concern that using a grinder would have presented a fire hazard because of the diesel fuel and oil canisters around the bulldozers. He added that protesters hiding in the woods presented an unspecified danger, although the Sheriff's videotape does not show the threatening presence of any other demonstrators. The officers made no attempt to negotiate with the protesters. They simply threatened repeatedly to use pepper spray unless the protesters released themselves from the "black bears." But before proceeding, the officers waited more than half an hour for the videographer to arrive.

The Sheriff's videotape reveals that two protesters released themselves from the "black bears" when threatened with the immediate use of pepper spray. Despite repeated warnings, two others refused. The last warning told the protesters that they had "five minutes" to release themselves from the "black bears." But the actual elapsed time between that last warning and the first application of pepper spray was less than two minutes. The officers applied the pepper spray with a Q-tip to the closed eyes of both protesters. Despite the protesters' pleas for water to flush the pepper spray out of their eyes, one of the officers can be heard on the videotape saying that they will only be given water if they release and that the pain will only get worse in thirty seconds when he sprays the OC in their faces. A minute later, he sprayed the OC directly into both of the protesters' faces in short full bursts from inches away. The videotape reveals that the blast of pepper spray ran down one protester's face and into his mouth.

Five minutes later, the protesters again refused to release and the officer in charge said that they "have all day to do this . . . [and] all kinds of cans of chemical weapons." Protester Tendick then said, "If you've got all day to do this, why don't you cut us out?" To which the officer in charge responded,

"because we are already committed here." The officers then offered to spray water from hand-held spray bottles onto the protesters' faces to try to flush the pepper spray out. Tendick testified that lightly spraying his face with water only made the pain worse because the water caused the OC to drip into his nose and mouth. On the videotape, Tendick can be heard screaming in pain after the water was administered. Thereafter, a Makita grinder was safely used to cut both protesters out. Despite the officers' stated concern for the danger posed by using the grinder around fuel and oil canisters, the officers did not remove the canisters when they decided to use the grinder. No injuries resulted from the use of the grinder.

C. The Riggs Protest

The third protest took place less than two weeks later, on October 16, 1997, in the Eureka office of Congressman Frank Riggs. Plaintiffs Terri Slanetz, Lisa Sanderson-Fox, Maya Portugal (a minor at the time), and Jennifer Schneider entered the Congressman's office, dropped wood chips on the floor, and chained themselves together using "black bears" around a tree stump that another protester had brought into the Congressman's office. Meanwhile, a crowd of fifty nonviolent protesters gathered on the street outside the Congressman's office.

Officers from the Eureka Police Department and from the Humboldt County special response team arrived at the scene in response to calls for assistance made by the Congressman's staff. The Humboldt County special response team determined that the wood chips would create a fire hazard if a grinder was used. Although Congressman Riggs's staff made a vacuum cleaner available to them to remove the wood chips, the officers chose not to use it. Instead, on the basis of the Humboldt officers' recommendation, the Eureka Police Captain in charge authorized the use of pepper spray on the protesters. Again no attempt at negotiation was made.

The Sheriff's videotape shows that the officers repeatedly warned the protesters that pepper spray would be used if they did not voluntarily release. One of the protesters declared that they had to take a stand against the use of pepper spray against nonviolent civil protesters. Another pleaded with the officers not to use the pepper spray. She pointed out that the protesters were all young women — one a minor — and asked the officers if they would want someone to use pepper spray on their own daughters. She also pointed out that the protesters posed no danger to anyone. Nevertheless, the officers pulled each of the protester's heads back and applied pepper spray to their eyes with a Q-tip. One protester, Maya Portugal, claims that one of the officers pried open her eyes and applied the pepper spray directly on them. Although the videotape lends some support to this claim, it is ultimately unclear whether this occurred. One of the protesters can be heard on the videotape yelling, "no, don't open them [my eyes]." The defendants deny that any of the protesters' eyes were opened when the pepper spray was used.

At this point, no water was offered to wash the pepper spray off the protesters' eyes. Seven minutes after the initial application, one of the officers can be heard on the videotape saying that water will be given if the protesters release themselves from the "black bears." At that point, one of the protesters released, followed shortly thereafter by another, leaving the two remaining protesters attached only to each other. Then, one of the remaining protesters asked why the officers could not physically carry them out of the Congressman's office and use a grinder to cut them out once they were outside the building. An officer responded by saying that the jail "would not accept you like this" and that it "is too dangerous to transport you like this."

One officer then stood within a foot of one of the remaining protesters and sprayed the pepper spray directly into her face. Within three minutes, the remaining two protesters released.

The officers then offered water from spray bottles to wash the pepper spray off the protesters' faces.

II.

Procedural History

On October 30, 1997, the nine protesters on whom the police had used pepper spray and an entity called the Headwaters Forest Defense filed this action under 42 U.S.C. § 1983, claiming that the application of pepper spray to the eyelids and faces of nonviolent protesters constituted use of excessive and unreasonable force to effect their arrests in violation of their Fourth Amendment rights. Each plaintiff sought damages for the pain and emotional trauma that each suffered and for the violation of their constitutional rights. Because no one sought medical treatment for physical injuries, special damages were not claimed. But plaintiffs sought punitive damages from the individual defendants.

On defendants' motion for summary judgment, the district court granted all individual defendants qualified immunity except for Humboldt County Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, the officers who initially authorized the use of pepper spray on the nonviolent protesters. The court, however, refused to grant summary judgment in favor of the defendants on the excessive force charges. On those charges, the court stated in its written decision that whether the use of pepper spray "is reasonable is for the jury to determine. Jury consideration is particularly appropriate here in that OC, a chemical agent, has not been used in past demonstrations." The court's decision noted that the parties vigorously disputed what occurred before, during, and after the use of pepper spray on the protesters during each protest. All of the disputed facts directly addressed the question whether the use of pepper spray was needed to effect the arrest of nonviolent protesters in lock-down devices. For example, the court's decision noted that the manufacturer's instructions on the can-

isters of pepper spray that the officers used "expressly discouraged" spraying OC from distances of less than three feet. Similarly, the decision noted that the Humboldt County Sheriff's deputy in charge of chemical agent training — the only certified trainer in the use of OC with whom Lewis and Philp had consulted before authorizing its use — recommended applying pepper spray with a Q-tip only. Yet here, the officers applied full blast sprays of OC into some of the protesters' faces from just inches away.

In addition, the court noted that Humboldt County had only one official general order that addressed police use of chemical agents such as pepper spray. And it stated in pertinent part that:

> The department issues non-lethal aerosol chemical agents to each sworn member of the Department. This aerosol is furnished as a *defensive weapon* for the protection of department members and as a possible alternative to the additional use of force. . . . The chemical agent is intended for use in those cases wherein a member of the Department is attempting *to subdue an attacker or a violently resisting suspect, or under other circumstances which under the law permit the lawful and necessary use of force*, which is best accomplished by the use of a chemical agent.

(Emphasis added). Similarly, the Eureka Police Department use-of-force policy statement "classified the use of OC-based products as a compliance technique directly *below* intermediate force on the use-of-force continuum." (Emphasis added). According to that policy statement, even intermediate force may not be used on nonviolent suspects who are passively resisting arrest. The policy stated in pertinent part that:

> [OC] shall be used instead of baton strikes whenever practical and when the failure to use it would result

> in the need to apply more force which holds the greater potential for injury. OC shall not be used to harass or punish a prisoner. Chemical agents are nonlethal devices designed *to temporarily subdue or overcome [an arrestee] by spraying the agent into the face. . . .*"

(Emphasis added).

The case proceeded to trial. After nine days, plaintiffs completed their case-in-chief. Thereupon, on defendants' motion, the district court ruled that Lewis and Philp were entitled to qualified immunity as a matter of law and dismissed the case against them. After deliberating for only six hours, the jury announced it was deadlocked.

The district court declined to give a formal *Allen* charge[3] to the jury as both parties requested, but the court did query the jury foreperson "to get some sense from the jury of the degree to which they [felt] that they [were] deadlocked." Without polling each juror, the court satisfied itself that the jurors had fully reviewed the evidence, considered each other's views, and were irreconcilably deadlocked. In a colloquy with counsel on the record but out of the jury's presence, the court stated that the issue in this case is "a simple and straightforward one . . . . *It's obviously one on which reasonable people can differ.*" (Emphasis added). Thereafter, the district court

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[3]An *Allen* charge — named after the case of *Allen v. United States*, 164 U.S. 492 (1896) in which it was first approved — is a supplemental jury instruction that a trial judge may give when a jury announces that it is unable to agree on a verdict. *See United States v. Hernandez*, 105 F.3d 1330, 1333-34 (9th Cir. 1997). Without being coercive, an *Allen* charge urges jurors to keep trying to reach a verdict. *See id.* It is designed to assist them in finding common ground by reminding them of their duties as jurors, encouraging them to give due deference to the arguments of fellow jurors and to reexamine their own views without abandoning their deeply felt beliefs. *See id.*; *see also* Ninth Circuit Manual of Model Criminal Jury Instructions, No.7.6 (1997).

declared a mistrial, set a new trial date, and took under submission defendants' renewed motion for judgment as a matter of law.

Eight weeks later, the district court granted defendants' renewed motion, vacated the new trial date, and entered judgment for the defendants, finding that "there is no *reasonable basis* for jurors to find that the officers' use of [pepper spray] was objectively unreasonable in light of the facts and circumstances confronting them." (Emphasis added). Plaintiffs timely appeal. We have jurisdiction to review the final order of the district court under 28 U.S.C. § 1291.

III.

A. Judgment as a Matter of Law

We review de novo the district court's grant of judgment as a matter of law, *see Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir. 1996), using "the same standard as the district court . . . under Fed. R. Civ. P. 50(a)." *Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997), *overruled on other grounds, ChromaLighting v. GTE Products Corp.*, 127 F.3d 1136 (9th Cir. 1997). Rule 50(a)(1) provides in pertinent part that:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . .

Fed. R. Civ. P. 50(a)(1).[4]

[4]Technically, the district court here granted defendants' renewed motion for judgment as a matter of law pursuant to Rule 50(b). The fact that the motion was granted after a mistrial was declared because of jury deadlock does not alter the standard to be applied on appeal.

"Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the non-moving party, allows only one reasonable conclusion . . . ." *Acosta*, 83 F.3d at 1145. "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). Indeed, " '[i]f conflicting inferences may be drawn from the facts, the case must go to the jury.' " *Pierce v. Multnomah County, Oregon*, 76 F.3d 1032, 1037 (9th Cir. 1996) (quoting *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986)).

Here, in its written decision granting defendants judgment as a matter of law, the district court acknowledged its obligation to view the evidence in the light most favorable to the plaintiffs as the nonmoving parties and to resolve all inferences and conflicts in the evidence in their favor. But, as the discussion below reveals, the district court failed to do so. Its decision is replete with assertions that the weight of the evidence favors the defendants and with conclusions that the court reached by resolving conflicts in the evidence *against* the nonmoving parties. In this regard, the district court erred. As the Supreme Court has held in ruling on a motion for judgment as a matter of law,

> the [district court] judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.

Anderson, 477 U.S. at 252.

A jury's inability to reach a verdict does not necessarily preclude a judgment as a matter of law. *See, e.g., Demaine v. Bank One*, 904 F.2d 219, 220 (4th Cir. 1990). But none of the cases cited by the defendants in support of the directed verdict in this case involved charges of excessive force. Each were

contract dispute cases in which the central issue was either the existence of a valid contract, *see, e.g., id.*; *Noonan v. Midland Capital Corp.*, 453 F.2d 459, 462 (2d Cir. 1972), or whether a contract fell within an exception to the antitrust laws, *see City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 559 F. Supp. 1021, 1026 (D. Haw. 1983). Although we have reviewed excessive force cases in which directed verdicts in favor of defendants have been ordered *after* juries rendered verdicts in favor of the plaintiffs, *see, e.g., Forrett*, 112 F.3d at 419-21 (affirming district court's order); *Acosta*, 83 F.3d at 1145-47 (reversing district court's order), we know of no excessive force case that presents the unique procedural posture of this case, i.e., a directed verdict for the defendants after the jury deadlocked and a mistrial was declared.

Indeed, *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), on which defendants primarily rely is procedurally wholly distinguishable from this case. In *Forrester*, the jury *reached* a verdict on the excessive force charge, the district court denied a motion for judgment notwithstanding the verdict, and the issue on appeal was whether substantial evidence supported the jury's verdict.[5] *See id.* at 806. Here, our review of the directed verdict is de novo. *See Amarel v. Connell*, 102 F.3d 1494, 1517 (9th Cir. 1996). The *Forrester* court was obligated the give substantial deference to the jury's determi-

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[5]Curiously, defendants here cite *Forrester* to support the contention that the existence of videotape footage of each of the incidents in question favors a determination of reasonableness as a matter of law. But this court's reference to the fact that videotape evidence existed in *Forrester* was made in the context of declaring that "the jury had more than a sufficient amount of evidence presented to them from which they could formulate their verdicts . . . ." *Id.* at 807. Thus, this aspect of *Forrester* is inapposite to defendants' contention here. Moreover, the videotape evidence in *Forrester* aided the jury in reaching a verdict because it apparently "removed much argument and interpretation of the facts themselves." *Id.* The videotape evidence here appears to raise more questions than it answers, which in the context of a motion for judgment as a matter of law must be resolved in favor of the plaintiffs as the nonmoving parties.

nation and uphold its verdict so long as the verdict was supported by substantial evidence. *See Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (stating that the Ninth Circuit reviews jury verdicts to determine if they are supported by "substantial evidence"). Because the *Forrester* court was required to defer to the jury, it ignored evidence that could compel the opposite result on de novo review.

The court in *Forrester* had to decide whether the jury's verdict that police use of Orcutt Police Nonchakus ("OPNs")[6] was not excessive force was reasonable. Here, we consider whether a reasonable jury could conclude that police use of pepper spray constitutes excessive force.

B. Excessive Force

The Fourth Amendment prohibition against unreasonable seizures permits law enforcement officers to use only such force to effect an arrest as is "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also Chew*, 27 F.3d at 1440-41. As we have repeatedly said, whether the force used to effect an arrest is reasonable "is ordinarily a question of fact for the jury." *Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (citing, *e.g.*, *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)); *see also Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). Although excessive force cases can be decided as a matter of law, they rarely are because the Fourth Amendment test for reasonableness is inherently fact-specific. *See Chew*, 27 F.3d at 1443 (citing *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989)). It is a test that escapes "mechanical application" and "requires careful attention to the facts and circumstances of each particular

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[6]As discussed *infra*, OPNs are "two sticks of wood connected at one end by a cord," *Forrester*, 25 F.3d at 805, which are used to grip a resisting arrestee's wrist in a progressively tighter and more painful manner until the arrestee ceases resisting. *See id.* at 808 n.5.

case," *Graham*, 490 U.S. at 396, and thus naturally favors jury resolution.

According to *Graham*, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a *careful balancing of 'the nature and quality of the intrusion* on the individual's Fourth Amendment interests' *against the countervailing governmental interests at stake.*" 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)) (emphasis added). Assessing "the nature and quality" of a given "intrusion" requires the fact finder to evaluate "the type and amount of force inflicted." *Chew*, 27 F.3d at 1440. Weighing the governmental interests involved requires the fact finder to evaluate such factors as "(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others, . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight," and any other "exigent circumstances [that] existed at the time of the arrest." *Chew*, 27 F.3d at 1440-41 & n.5. As we have previously explained, "the essence of the *Graham* objective reasonableness analysis" is that " '[t]he *force* which was applied must be balanced against the *need* for that force: it is *the need for force* which is at the *heart* of the *Graham* factors.' " *Liston*, 120 F.3d at 976 (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994)) (emphasis added). Thus, where there is no need for force, *any* force used is constitutionally unreasonable. *See P.B. v. Koch*, 96 F.3d 1298, 1303-04 & n.4 (9th Cir. 1996).

We begin our analysis of the reasonableness of the force used in this case by examining the district court's assessment of the "nature" of the use of pepper spray and the "quality of the intrusion" caused on the protesters' bodily integrity under the Fourth Amendment. We will then examine the district court's assessment of the countervailing governmental interests at stake, focusing first on the interests on which the district court relied in granting defendants' motion for judgment

as a matter of law. We will then examine the governmental interests addressed in Fourth Amendment jurisprudence that the district court failed to consider. Such interests include the safety threat, if any, posed by the protesters to the public, to the officers, or to themselves; the exigencies, if any, bearing on the decision to use pepper spray during each protest; the severity of the protesters' crimes; and the alternatives available to the police to effect the arrests of the protesters.

1. The Nature and Quality of the Intrusion

Here, the district court concluded that "the severity of the intrusion upon the arrestees' personal integrity was minimal" because it did not involve the threat of "deadly force or even . . . a significant level of physical force. Rather the force used was merely the infliction of transient pain without significant risk of physical injury." We disagree with this characterization of the intrusion.

Although the absence of deadly force or physical blows can mean that a intrusion on an arrestee is "less significant than most claims of force," *Forrester*, 25 F.3d at 807, that fact alone is not dispositive in excessive force cases. Under Fourth Amendment jurisprudence, the law is well settled that a plaintiff may recover " 'nominal damages without proof of actual injury' " for unreasonable intrusions on one's bodily integrity. *Larez*, 946 F.2d at 640 (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding nominal damages are available under 42 U.S.C. § 1983)). Indeed, in *Wilks v. Reyes*, 5 F.3d 412 (9th Cir. 1993), we expressly rejected the Fifth Circuit's requirement that a plaintiff show "significant injury" to establish an excessive force claim under the Fourth Amendment. *Id.* at 416 ("The law of this circuit entitles a plaintiff to an award of nominal damages if the defendant violated the plaintiff's constitutional right . . . *even if the plaintiff suffered no actual damage*." (emphasis added)). Thus here, the district court erred in focusing on the purported absence of evidence of a "significant risk of physical injury" from the use of pep-

per spray. Under *Graham* and *Forrester*, whether the use of force poses a risk of permanent or significant injury is a *factor* to be considered in evaluating the need for the force used in a particular case — but it is certainly not dispositive.

Moreover, the evidence in the record does not establish that the use of pepper spray here constituted a "minimal" intrusion on the protesters' bodily integrity as a matter of law. The evidence suggests that the protesters suffered excruciating pain when the OC was applied to their eyelids with a Q-tip — and even more so when sprayed into their faces in full blasts from inches away. In fact, the Humboldt County Sheriff's deputy in charge of chemical agent training testified that pepper spray is *designed* to cause intense pain, a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx. He also testified that its known psychological effects are "disorientation, anxiety, and panic." On this record, a rational juror could readily conclude that the intrusion suffered was more than "minimal."[7]

Indeed, our opinion in *Forrester* suggests that the uncontrollable nature of the pain caused by pepper spray distinguishes it from the "pain compliance technique" challenged in that case. *Forrester* held that sufficient evidence supported the jury's finding that the use of OPNs was reasonable under

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[7]We previously held that the use of pepper spray by a defendant during the commission of a felony may constitute use of a *dangerous weapon*, defined as "capable of inflicting death or serious bodily injury" for sentencing purposes. *United States v. Neill*, 166 F.3d 943, 949 (9th Cir. 1999) (citing U.S.S.G. § 1B1.1, cmt. n.1(d),(j)). Admittedly, police use of pepper spray as a tactical tool to effect arrest is distinguishable from its use by a felon during the commission of a robbery. Nevertheless, the evidence in this case reveals that the police sprayed OC directly into some of the protesters' faces from only inches away in much the same manner as the defendant in *Neill*. And yet, Humboldt County's deputy in charge of chemical agent training testified that spraying OC into a person's face from less than 3 feet is not safe.

the circumstances. OPNs are "two sticks of wood connected at one end by a cord," 25 F.3d at 805, which are used to grip a resisting arrestee's wrist in a progressively tighter and more painful manner until the arrestee ceases resisting. *See id.* at 808 n.5. In *Forrester*, the police used OPNs on hundreds of "Operation Rescue" demonstrators who were attempting to shut down the operations of an abortion clinic by blocking access to the facility. *See id.* at 805, 807.[8] In explaining the nature of the force used in *Forrester*, we stated:

> Unlike the use of a lighted cigarette, which would create immediate and searing pain, the discomfort produced by the OPNs was gradual in nature. The videotape (which was seen by the jurors) illustrates that the police first applied a loose grip and then progressively tightened their hold until the demonstrators stood and ceased resistance. The moment the demonstrators complied, the police released the OPNs.

Id. at 808 n.5. Although the use of OPNs in *Forrester* caused

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[8]According to the defendants, the demonstrators in *Forrester* were "truly passive" because they went limp when police attempted to take them into custody, whereas the protesters here were not "passive," but "actively resisting" arrest because they used the lock-down devices. The fact that the demonstrators in *Forrester* posed an actual safety threat to the public by physically blocking access to medical facilities is a factor that the defendants overlooked in assessing the demonstrators "passive" or "active" stance. In fact, the defendants contend that because we upheld the jury's verdict in *Forrester* that declared the use of OPNs on "passive" demonstrators to be reasonable under the circumstances, we should therefore hold that the use of pepper spray on the "actively resisting" protesters in this case is also reasonable. This contention reflects a basic misunderstanding of the full factual breadth of the *Graham* balancing test. More importantly, this contention misses the point of the issue on appeal. We are not asked to decide whether the use of pepper spray in this case constituted excessive force or not. We are only to decide whether the district court erred in directing a verdict for the defendants in light of the evidence in the record.

"varying degrees of injury . . . including bruises, a pinched nerve, and one broken wrist," we upheld the jury's verdict in part because: "Each officer had the discretion to use force or not, and if deciding to do so, how much force to apply." *Id.* at 808.

Here, the videotape evidence reveals that the application of the pepper spray with a Q-tip and then by short full blasts created "immediate and searing pain" that could not be moderated by the officers at their discretion or terminated by them the moment the protesters complied with their demands. According to the defendants, the only way to relieve the pain caused by pepper spray is to flush it out thoroughly with water. Police training tapes recommend using a "free-flowing hose to wash the victim's face" or "the use of a big bucket of water in which the victim can actually stick [his or her] face down into to get relief." But here, the officers offered only to spray water in short bursts onto the protesters' faces from hand-held plastic bottles, which the evidence suggests may have actually exacerbated the pain by causing the OC to run into the protesters' noses and mouths rather than flushing it out. Moreover, whether water was offered at all for this purpose during each protest is disputed. Yet the district court's ruling fails to mention this evidence, let alone view it in a light most favorable to the plaintiffs as the nonmoving parties.[9]

Forrester did not hold "that pain compliance techniques are constitutionally permissible as a matter of law." 25 F.3d at 809 (Kleinfeld, J., dissenting). Nor did it establish a rule of qualified immunity for the use of pain compliance techniques

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[9]An example of the district court's failure to view the evidence in the light most favorable to the plaintiffs as the nonmoving parties and to resolve all conflicts in the evidence in their favor is the court's statement that "the videotape footage plainly demonstrates that the officers were not making any attempt to open plaintiffs' eyes." The court came to this conclusion despite plaintiff Portugal's contrary testimony, the cry of one of the young female protesters heard on the videotape asking the officers not to open her eyes, and the unclear images revealed on the videotape.

to arrest passively resisting misdemeanants. *Forrester* simply held that whether the use of OPNs as a pain compliance technique constituted excessive force was a question of fact that was properly submitted to the jury for its decision. Similarly, we hold here that whether the use of pepper spray in this case constituted excessive force is a question of fact that should have been submitted to a jury for its decision.

2. The Governmental Interests at Stake

The district court found that the primary governmental interests at stake during the three protests were in "quickly removing the trespassing plaintiffs" and in "preventing the organized lawlessness" of a "large group of protesters." The court stated:

> In each incident, plaintiffs were part of a large group of protesters operating in an organized and concerted effort to invade private property, obstruct business and hinder law enforcement. Although these crimes are misdemeanors, "[t]he wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of citizens." *Bray v. Alexandria Woman's Health Clinic*, 506 U.S. 263, 287 (1993) (Kennedy, J., concurring).

We disagree with the district court's characterization of the evidence. In assessing the governmental interests, the court failed to view the evidence in the record and all inferences that could be drawn therefrom in a light most favorable to the plaintiffs. Moreover, the court incorrectly applied the *Graham* test and Justice Kennedy's concurrence in *Bray*. When the evidence is viewed in the light most favorable to the plaintiffs, it is clear that the governmental interests at stake here do not compel the conclusion that the use of pepper

spray — either with a Q-tip or by short full blasts — was reasonably necessary as a matter of law in the totality of the circumstances.

i. Speedy Arrests

The evidence in the record strongly suggests that the officers' decisions to use pepper spray during each protest had nothing to do with the government's purported interest in "quickly removing the trespassing plaintiffs." During the Scotia protest, the deputies allowed the three protesters who had complied with the police as soon as the pepper spray warnings were given to remain on site — and to continue to cheer on their still-resisting cohorts. If the officers used the pepper spray to hasten the removal of the protesters from private property, failing to remove the protesters who had released from the "black bears" belied this intent. Moreover, the repeated applications of pepper spray actually prolonged the incident for over an hour. Once the decision was made to remove the protesters physically, all were out of the building and in custody within six minutes. Ten minutes later, all were safely ground-out of the lock-down devices.

During the Bear Creek incident, the officers delayed using the pepper spray for half an hour until the sheriff's videographer arrived. In addition, one of the officers was heard to say on the videotape that they "have all day to do this." At Congressman Riggs' office, after the initial applications of pepper spray, two of the protesters voluntarily released themselves from the lock-down devices, but they were not immediately removed from the premises. Nor did the officers physically remove the remaining two female protesters still in the lock-down devices, despite their youth and diminutive size. Instead, the officers chose to reapply the pepper spray in short full bursts into their faces. The evidence suggests that full blast sprays of pepper spray actually delayed the protesters' arrests and prolonged the incident.

Thus, the evidence simply does not support the district court's conclusion that the use of pepper spray was needed to remove the protesters from the premises quickly.

ii. Organized Lawlessness

The district court concluded that one of the reasons the officers needed to use the pepper spray to effect the arrests of the protesters was because "the officers had a substantial interest in preventing the organized lawlessness" of a "large group of protesters." Each incident involved two to seven protesters in lock-down devices — including six young women, two of whom were sixteen and seventeen years old. During both the Scotia and Riggs protests, the protesters in the lock-down devices were demonstrating inside the Pacific Lumber Company building and Congressman Riggs's office. They were physically and visually separated from the large peaceful demonstrations that were taking place outside the two buildings. The evidence regarding the Bear Creek protest is at best conflicting as to how many protesters — other than the four in lock-down devices — were present. The officers claim that many protesters were hiding in the woods. But there is no evidence that a large, lawless group was anywhere in sight.

Most importantly, the uncontroverted evidence is that the decision to use pepper spray on the protesters during each incident was not made because of the presence of "a large group of protesters." The officer in charge during each incident testified that the decision to use pepper spray was made solely because of the difficulty in using a Makita grinder to remove the "black bears." With respect to the Scotia and Riggs protests, all the officers who testified stated that the presence of the protesters outside the buildings was not a factor in the decision to use the pepper spray on the protesters inside the buildings.

In fact, the defendants consistently testified that the pepper spray was needed during each of the protests simply

because a handful of protesters had used lock-down devices, which defendants argued constituted "active" resistance to arrest. But this characterization of the protesters' conduct is belied by the Eureka Police Department's own definition of "active resistance," with which Sheriff Lewis agreed. According to that written definition, "active resistance" occurs when the "subject is attempting to interfere with the officer's actions by inflicting pain or physical injury to the officer without the use of a weapon or object." No evidence in the record suggests that the protesters here attempted to inflict pain or serious injury on the arresting officers.

Indeed, there is no evidence supporting the notion that the police needed to use pepper spray in this case to "maintain order and preserve the rights of its citizens" against a "large group" of "lawless" and "menacing" protesters. *Forrester*, 25 F.3d at 807 (quoting *Bray*, 506 U.S. at 287 (Kennedy, J., concurring)). The force used to effect arrests can be deemed reasonable only on the basis of the facts and circumstances confronting the police when the arrests took place. Such force cannot be justified on the basis of abstract notions of law and order. *Bray* was not an excessive force case. Justice Kennedy's cautionary words were uttered in the context of describing when deficiencies in the resources of state and local law enforcement may necessitate the involvement of federal authorities "to protect the lives and property of citizens or to enforce the criminal law." *Bray*, 506 U.S. at 287-88 (quoting 42 U.S.C. § 10502(3)). His words should not be invoked to justify the use of force to effect arrests in factual circumstances that do not justify the use of force.

iii. Safety of Others

Under our Fourth Amendment jurisprudence, "the most important single element" in the *Graham* analysis is "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Chew*, 27 F.3d at 1441. Here, the protesters were nonviolent and unarmed. Most were young

women, two of whom were minors; none were physically menacing. They posed no safety threat to themselves, the officers, or the public at large.

Unlike the protesters in *Forrester*, the protesters here did not block access to and from a medical clinic, " 'preventing patients, as well as physicians and medical staff, from entering the clinic to render or receive medical or counseling services.' " 25 F.3d at 805 n.1 (quoting *Bray*, 506 U.S. at 309). Nor did they behave threateningly toward the police. To the contrary, the protesters repeatedly pleaded with the officers not to use the pepper spray because they posed no danger to anyone. Finally, the protesters posed no danger to themselves. *Cf. Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997) (holding that the use of pepper spray to thwart a suicide attempt of a mentally ill man who refused treatment was reasonable). Because the protesters' conduct posed no danger to themselves or others, a reasonable fact finder could conclude that using pepper spray to effect their arrests bore "no reasonable relation to the need" for force. *Koch*, 96 F.3d at 1304.

iv. Split-Second Judgment

Throughout the trial and in their papers on appeal, defendants continually alluded to the ongoing battle the Humboldt County Sheriff's Department and the Eureka Police Department were having with environmental activists prior to the protests in question. But the proper focus of the analysis under *Graham* is on events *immediately* confronting the officers when they decided to use pepper spray. The fact that the defendants were increasingly frustrated by the protesters — who had developed techniques such as lock-down devices to prolong nonviolent civil protests — is irrelevant under *Graham*.

Under *Graham* and its progeny, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer *on the scene* . . . ." *Graham*,

490 U.S. at 396 (emphasis added). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 396-97. "[W]hen we evaluate whether the police conduct was lawful or unlawful, we must do so in light of the dangerousness of the particular situation that confronted the police," *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996), "without regard to [the officers'] underlying intent or motivation," *Graham*, 490 U.S. at 397.

Nothing in the record suggests that the decision to use pepper spray during each of the three protests at issue in this case was a "split-second judgment" made "in circumstances that were 'rapidly evolving.' " *Chew*, 27 F.3d at 1443 (quoting *Graham*, 490 U.S. at 397). To the contrary, the officers testified that the *only* exigency here was the use of the "black bear" lock-down devices. And they further testified that the decision authorizing pepper spray's use on *any* protester using such a lock-down device was made *before* the officers were even called to the scenes of the protests. In light of this evidence, a reasonable fact finder could conclude that the decisions to use pepper spray during each of the protests were not made in the heat of the moment.

v. Severity of the Crime

The evidence in this case suggests that the only crime the protesters had committed when pepper-sprayed was trespass. *Cf. Lamb v. City of Decatur*, 947 F. Supp. 1261 (C.D. Ill. 1996) (holding that it was a jury question whether the use of pepper spray on two thousand, nonviolent, unarmed labor protesters who were exercising their First Amendment rights and whose only crime was trespass and therefore "negligible" was reasonable). Although the commission of a misdemeanor offense is "not to be taken lightly," it militates against finding the force used to effect an arrest reasonable where the suspect

was also nonviolent and "posed no threat to the safety of the officers or others." *Hammer v. Gross*, 932 F.3d 842, 846 (9th Cir. 1991) (holding that the fact that the crime committed was a misdemeanor was a factor that the jury should consider in determining whether the forced used by the arresting officer against a DUI suspect to obtain a blood sample over the suspect's verbal objection was reasonable); *see also Chew*, 27 F.3d at 1442 & n.9 (suggesting that a crime's "severity" in the excessive force context turns on whether it involves violence or an armed suspect).

Indeed, the severity of the protesters' crime and their nonviolent behavior stands in stark contrast to that of the felons on whom the use of pepper spray has been deemed reasonable by other courts. For example, the protesters were not belligerent felons resisting arrest for drunk driving as in *Passino v. State*, 669 N.Y.S.2d 793 (1998) (finding the use of pepper spray to induce cooperation reasonable). Nor were they narcotics suspects on the verge of swallowing contraband as in *United States v. Halloway*, 906 F. Supp. 1437 (D. Kan. 1995) (finding severity of crime and threat of swallowing contraband sufficient to justify use of pepper spray); *Singleton v. City of Newburgh*, 1 F. Supp. 2d 306 (S.D.N.Y. 1998) (same). As these cases illustrate, the use of pepper spray on a suspect is not reasonable simply because the police have the legitimate objective of making an arrest. It is only reasonable if such force is needed to make an arrest in the circumstances. Here, a rational juror could conclude that the protesters' nonviolent misdemeanor offense of trespass did not render pepper spray necessary to effect their arrests.

vi. Alternatives Available

Because the protesters posed no immediate threat to the safety of anyone during the protests, the officers — and the district court in reviewing the reasonableness of their actions — were required to consider "[w]hat other tactics if any were available" to effect their arrest. *Chew*, 27 F.3d at 1443. But,

in reviewing the availability of "other tactics," the district court erred. First, the court simply concluded that the "plaintiffs failed to present any evidence that the officers had a viable alternative means for effecting arrest." To the extent that the court regarded this finding to be determinative, it was mistaken. At most, whether alternatives existed is only a factor to be considered in assessing the need for the force used by the police. *See Alexander*, 29 F.3d at 1367.

Second, plaintiffs presented a great deal of evidence as to alternatives that were available during the protests, including: (a) negotiation; (b) using the Makita grinder or other tools to remove the lock-down devices; (c) physically removing the protesters; (d) and "waiting them out." The court, however, dismissed these alternatives out of hand, resolving all conflicts in the evidence and drawing all inferences therefrom against the plaintiffs. Defendants also presented evidence that they were legitimately concerned about the potential for a grinder's operation to cause a fire or accidental injuries to protesters or to police-operators. Before the protests occurred, defendants concluded that pepper spray was the "safer" tactic for securing the protesters' release from the "black bears." They made this decision despite the officers' extensive training in the use of a Makita grinder and the fact that no injuries had yet occurred when the grinder had been used hundreds of times to remove these lock-down devices.

Given the conflicting evidence concerning available alternatives to pepper spray, the district court should not have directed a verdict in favor of defendants. Where the evidence suggests that "other tactics" were available to the police to effect an arrest, the reasonableness of the force used was for the jury to decide. *Cf. Chew*, 27 F.3d at 1443. The standard governing a court's decision whether to grant judgment as a matter of law does not permit otherwise. *See Anderson*, 477 U.S. at 252.

IV.

In sum, the district court's conclusion that the officers did not use excessive force to effect the arrests of the protesters as a matter of law is untenable given the evidence presented at trial. Whether the officers reasonably needed to apply pepper spray — either with Q-tips to the protesters' eyelids or by short full blasts into their faces — to arrest the protesters was in dispute. It is clear to us that a "fair-minded jury could return a verdict for the plaintiff[s] on the evidence presented." *Id.* The evidence reveals that the "nature and quality of the intrusion" caused by the pepper spray on the protesters' bodily integrity under the Fourth Amendment was more than "minimal," as the district court had concluded. Indeed, the pepper spray caused the protesters "immediate and searing pain," *Forrester*, 25 F.3d at 808 n.5, which the officers could not instantly stop inflicting once the protesters agreed to release themselves from the "black bears." Under the Fourth Amendment, using such a "pain compliance technique" to effect the arrests of nonviolent protesters can only be deemed reasonable force if the countervailing governmental interests at stake were particularly strong. Our analysis of those interests here, however, reveals just the opposite. The protesters posed no safety threat to anyone. Their crime was trespass. The "black bear" lock-down devices they used meant that they could not "evade arrest by flight." *Graham*, 490 U.S. at 396. They were not "menacing" demonstrators seeking to intimidate the police or the public: most were young women; two were minors. Although the "black bear" devices posed an impediment to arrest; they did not render arrest impossible. Alternatives were available. And the use of pepper spray did not hasten the removal of the protesters from the premises, but prolonged the incidents. In these circumstances, the need for the force used during the protests falls far short of supporting a judgment as a matter of law in favor the defendants.

The inherently fact-specific determination whether the force used to effect an arrest was reasonable under the Fourth

Amendment should only be taken from the jury in rare cases. *See Chew*, 27 F.3d at 1443; *Barlow*, 943 F.2d at 1135. This is not such a case. Viewing all the evidence in the light most favorable to the plaintiffs as the nonmoving parties, a rational juror could easily conclude that there was sufficient evidence for a verdict in favor of the plaintiffs. Indeed, the fact that the district judge, after initially declaring a mistrial and ordering a new trial, stated that "reasonable people can differ" on the issue of excessive force in this case speaks directly to the wisdom of our decision now to reverse the court's grant of judgment as a matter of law in favor of the defendants.

V.

A. Qualified Immunity

" 'The doctrine of qualified immunity protects government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Katz v. United States*, 194 F.3d 962, 967 (9th Cir. 1999) (quoting *Somers v. Thurman*, 109 F.3d 614, 616-17 (9th Cir. 1997) (internal quotations omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Sloman v. Tadlock*, 21 F.3d 1462, 1466-67 (9th Cir. 1994) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The determination whether an official is entitled to qualified immunity involves a two-step analysis: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

1. Clearly Established Law

"[W]hether the law was clearly established . . . is a pure question of law for the court to decide." *Mendoza v. Block*, 27

F.3d 1357, 1360 (9th Cir. 1994). For a right to be "clearly established," its "contours . . . must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Id.* at 1361 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (alternation in original). Although plaintiffs need not show that the very action challenged was previously held unlawful, they must show that " 'in the light of pre-existing law the unlawfulness must be apparent.' " *Id.* (quoting *Anderson*, 483 U.S. at 640).

Here, the district court correctly ruled that the law concerning the use of excessive force is clearly established.

> It is clearly established that the use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure. The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted.
>
> This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. . . . An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.

Id. at 1362 (internal quotation marks and citations omitted). Thus, even though police use of pepper spray on nonviolent protesters engaged in civil disobedience is unprecedented, Sheriff Lewis and Chief Deputy Sheriff Philp were aware of the law governing its use. Indeed, Sheriff Lewis personally issued Humboldt County Sheriff's Department's general order, which explains the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment.

2. Objective Reasonableness

In a civil rights action in which qualified immunity is asserted, the reasonableness of an officer's conduct comes into play both "as an element of the officer's defense" and "as an element of the plaintiff's case." *Katz*, 194 F.3d at 967.

> To determine whether an officer is entitled to the defense of qualified immunity when the use of force is in issue, the question asked is whether a hypothetical officer reasonably could have believed that the amount of force used was reasonable. To resolve the merits of an excessive force claim, the question is whether a reasonable officer could have believed that the force used was necessary under the circumstances. Because of this parity, [this court has] repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.

Id. at 968 (resolving an apparent intracircuit conflict between excessive force cases that equated the inquiry on the merits with the qualified immunity analysis and other cases that suggested the two lines of inquiry are distinct) (internal quotation marks and citations omitted). Whether the trial judge or jury should ultimately decide if an officer is entitled to qualified immunity in a given case "has not been definitely resolved." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100 (9th Cir. 1995) (citing *Sloman*, 21 F.3d at 1467-69). But where essential historical facts concerning what an official knew or did are in dispute, "it is clear that these are questions of fact for the jury to determine." *Id.* at 1099; *see also Katz*, 194 F.3d at 969 (holding that if disputed facts prevent the court from deciding whether excessive force was used as a matter of law, then the court cannot decide whether officials are entitled to qualified immunity for the use of that force as a matter of law either).

Here, because historical facts are in dispute concerning "the amount of force used" and "the circumstances that might justify the amount of force used," *id.*, the district court erred in granting qualified immunity to Sheriff Lewis and Chief Deputy Sheriff Philp as a matter of law. The disputed facts concerning the amount of force used here include: (1) whether the pepper spray was uniformly applied to closed or open eyes; (2) whether the applications of OC with a Q-tip were necessary; (3) whether full blasts of OC sprayed onto the protesters' faces were necessary and executed at a safe distance; (4) whether the application of water by spray bottle to the protesters' eyelids and faces exacerbated the pain caused by the pepper spray or actually provided relief from the OC; and (5) the nature and extent of pain and emotional trauma caused by the Q-tip applications and the full blast spray applications.

The disputed facts concerning the circumstances justifying the use of force include: (1) the severity of the crime committed; (2) the danger, if any, posed by the protesters to the public and to the police; (3) whether use of a lock-down device constituted "active resistance" to arrest; (4) whether protesters other than those in lock-down devices posed any threat to the police or the public; (5) whether negotiation, "waiting them out," physically carrying the protesters out, and using the Makita grinder constituted viable and reasonable alternatives; and (6) whether any other exigencies were present to justify applying pepper spray with a Q-tip to the protesters' eyelids and again by full spray blasts into their faces.

In addition, Sheriff Lewis's and Chief Deputy Sheriff Philp's individual liability is not just based on the determination whether the use of pepper spray constituted excessive force under the circumstances. Their individual liability to the plaintiffs is also based on the extent to which they:

> "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which [they] knew or reasonably should have

> known, would cause others to inflict the constitutional injury." A supervisor can be liable in his individual capacity "for his own culpable action or inaction in the training, supervision, or control of his subordinates; [or] for his acquiescence in the constitutional deprivation . . . ."

Watkins v. City of Oakland, 145 F.3d 1087, 1093 (9th Cir. 1998) (quoting *Larez*, 946 F.2d at 645). Thus, if what they knew and did when they authorized the use of pepper spray on nonviolent protesters is in dispute, their entitlement to qualified immunity cannot be decided as a matter of law by the court. *See Sinaloa*, 70 F.3d at 1099-1100.

Here, much of what Lewis and Philp knew and did is in dispute. For example, Philp testified that in authorizing pepper spray to be used on the protesters, he specifically "told [the officers that he] did not want them to give a full face blast, that [he] wanted them to avoid the direct application to the nose and mouth area, keep it up in the area on more a limited basis and that they were not to apply it [in] close proximity to the open eyeball." Yet, the officer in charge during each of the protests testified that Philp and Lewis authorized full spray blasts of OC, not just Q-tip applications. The officer who applied the pepper spray to the protesters also testified that Philp never instructed him on whether the pepper spray could or should be reapplied, how often, at what intervals, or under what circumstances.

In addition, Lewis and Philp testified that they consulted with the district attorney about the legality and advisability of pepper spray's use on nonviolent protesters. But the district attorney expressly limited his opinion to the issue of criminal liability for an unspecified use of pepper spray, advised that he could not opine as to civil liability, and recommended that defendants obtain a separate opinion about civil liability before using the pepper spray.

Lewis also testified that prior to the incidents in this case, he and the County risk manager "discussed the lock devices, what we were encountering and [I] shared with her the concept of the Q-tip application of pepper spray." But the risk manager's testimony contradicts this. She testified that she could not recall a conversation with Philp, Lewis, or any other police official *before* the incidents at issue concerning the use of OC by Q-tips on nonviolent protesters. She did recall a conversation with Lewis, however, that occurred about a week before the Scotia protest, which was very brief and took place in the hallway outside her office. During that conversation, she spoke with Philp about a specific incident and the possibility of using OC on protesters who locked-down by using concrete, instead of using jackhammers to remove the concrete.

Moreover, when Lewis and Philp authorized their officers to use the pepper spray on the plaintiffs, although they fully reviewed the law and consulted then-current literature on law enforcement's tactical use of pepper spray, they both admitted knowing that: (1) the California Department of Justice had only approved the use of pepper spray on "hostile or violent" subjects; (2) the California Highway Patrol's use of force policy specifically prohibits the use of pepper spray as it was used here; and (3) pepper spray had never before been used in this manner in Humboldt County, the State of California, or anywhere in the nation. They also conceded that Humboldt County's only written policy statement on the proper use of pepper spray described it as a "defensive weapon," only to be used in "attempting to subdue an attacker or a violently resisting suspect, or under other circumstances which under the law permit the lawful and necessary use of force . . . by . . . chemical agent."

Defendants contend that the use of pepper spray here falls under the category of "other circumstances which under the law permit the lawful and necessary use of force . . . by . . . chemical agent." The determination whether that is correct is

inextricably linked with the factual question whether the use of pepper spray in this case constituted excessive force. Therefore, under Rule 50, the district court should not have granted defendants' motion for judgment as a matter of law on qualified immunity grounds.

In sum, because historical facts were in dispute concerning the reasonableness of the use of pepper spray in this case, as well as what Lewis and Philps knew and did when they authorized its use, the district court erred in deciding that these officials were entitled to qualified immunity as a matter of law.

VI.

Accordingly, we REVERSE the district court's decisions to enter judgment as a matter of law for defendants Humboldt County and its Sheriff's Department and the City of Eureka and its police department and to dismiss Sheriff Lewis and Chief Deputy Sheriff Philp on the basis of qualified immunity. We REMAND this action for a new trial in accordance with the views herein expressed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Northern District of California

No. C-97-3989-VRW

HEADWATERS FOREST DEFENSE, et al.,
Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,
Defendants.

Oct. 26, 1998.

ORDER

WALKER, District J.

The jury in the above action was unable to reach a verdict and, as a result, the court declared a mistrial. After a careful review of the evidence and applicable law, it is apparent that there is a more serious problem here than a disagreement among jurors as to the proper outcome of the case. For the reasons that follow, the court concludes that plaintiffs' claims are legally untenable and that the court must grant defendants' motion for a directed verdict pursuant to FRCP 50(b). The court reserved ruling on this motion at the close of the plaintiffs' case and at the close of evidence.

I

As a preliminary matter, the court notes that the jury's inability to reach a verdict does not necessarily indicate that reasonable minds could differ or that plaintiffs have introduced substantial evidence to support their claims. See *Demaine v. Bank One*, 904 F.2d 219, 220 (4th Cir. 1990) (deadlocked jury does not prevent entry of a directed verdict under Rule 50); *Noonan v. Midland Capital Corp.*, 453 F.2d 459, 462 (2d Cir. 1971) (deadlocked jury does not mean that the disagreement is fair and reasonable); *City and County of Honolulu v. Hawaii Newspaper Agency*, 559 F.Supp. 1021, 1026 (D. Hawaii 1983) (court may grant judgment as a matter of law following a mistrial due to a deadlocked jury). If the existence of some jurors favoring one party were enough to establish a legitimate controversy, no court could ever grant a renewed motion for a judgment as a matter of law following a verdict or a hung jury. Both, however, are commonplace and both are envisioned by FRCP 50(b).

Under FRCP 50, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All credibility determinations, weighing of evidence and drawing of inferences from the evidence are jury functions. *Anderson*, 477 U.S. at 253. Hence, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* If, however, there is "no substantial evidence" to support the non-moving party's claim, the court must grant judgment as a matter of law. *California Computer Products v. IBM*, 613 F.2d 727, 733 (9th Cir. 1979).

II

The present litigation arises out of three incidents that occurred in September and October of 1997 during which aerosol oleoresin-capsicum (OC) was applied to self-described "locked-down" demonstrators. In each of the three incidents, the demonstrators trespassed on private property and locked themselves together with steel devices known as "black bears." The black bears used in these incidents consist of two steel cylinders. One end of each cylinder is cut at a forty-five degree angle and welded to the other cylinder to form a right angle. A section of steel rod is welded into the center of the cylinders at or as close as possible to the right angle. The trespassers attached their wrists inside the black bears by using a steel bracelet that they clipped to the steel rod. The trespassers thereby managed to link themselves arm to arm and effectively resist arrest.

At trial, videotape footage taken by the Humboldt County Sheriff's Department and live testimony established the following:

On September 25, 1997, at the offices of Pacific Lumber Co., eight trespassers entered the building and locked themselves together in a circle. Among these trespassers were plaintiffs Vernell Lundberg, Jennifer Schneider, Molly Burton and Eric Neuwirth. In response to this intrusion, employees of Pacific Lumber called the police and several sheriff's deputies responded. While plaintiffs chanted slogans and sang songs, Sergeant Ciarbellini and Deputy Held discussed the possibility of using a Makita grinder to cut plaintiffs out of their steel bindings, but decided that the use of OC was the safest and quickest means of effecting arrest.

After repeatedly pleading with plaintiffs, asking them to release and warning them that if they did not comply

OC would be applied, the officers began to use cotton swabs to apply a small amount of liquid OC to the outside corner of the plaintiffs' closed eyes. Before applying OC to each individual plaintiff, the deputies again pled with the individual, asking him or her to release. Only after the individual renewed his or her refusal to cease resisting arrest did the deputies apply OC. After the first application, the deputies proceeded to apply a second application of OC to those plaintiffs who did not release. Ultimately all but two plaintiffs released; these two were carried outside and cut free using a Makita grinder. Plaintiffs introduced no evidence of a risk of physical injury or actual physical injury resulting from the use of OC at this incident.

On October 3, 1997, again on Pacific Lumber property, plaintiffs Michael McCurdy and Noel Tendick locked themselves together through the treads of a Caterpillar tractor. The responding deputies determined that the risk of injury and fire mandated that OC be used before attempting to cut plaintiffs out. The deputies warned the trespassers that if they did not release, OC would be applied. After waiting for a short period of time, the deputies renewed their warning, requested that plaintiffs release, and then proceeded to apply OC by swabbing the outside corner of plaintiffs' closed eyes. The deputies then waited for a few minutes before again requesting that plaintiffs stop resisting arrest, this time warning that a direct spray of OC would be applied. Plaintiffs again refused to release and the deputies proceeded to spray OC in a single pass across plaintiffs' closed eyes. Plaintiffs still refused to release and ultimately had to be cut free from the tractor using the Makita grinder. Plaintiffs introduced no evidence of a significant risk of physical injury or actual physical injury resulting from the use of OC at this incident.

The third incident, on October 16, 1997, occurred in the offices of Congressman Frank Riggs. Here the four trespassers, plaintiffs Terri Slanetz, Lisa Sanderson-Fox, Maya Portugal and Jennifer Schneider, locked themselves in a circle around a tree stump after dumping wood shavings onto the floor. The responding officers decided that risk of injury and fire mandated that they first attempt to gain compliance by applying OC. The officers repeatedly warned the plaintiffs of their intention to use OC and requested that plaintiffs stop resisting arrest. Plaintiffs refused to comply. The deputies applied OC to plaintiffs' eyes. This time, however, officers swabbed across the eyelid, inside corner to outside corner. Maya Portugal, alone among the plaintiffs, testified that the cotton swab came into contact with the surface of her eye. This is not apparent from the video footage. After the first application, two plaintiffs continued to resist arrest. One of the deputies repeated his request that plaintiffs release and warned that he intended to apply a spray of OC if the plaintiffs did not comply. Upon plaintiffs' refusal to cooperate, the deputy directed a single spray across the eyes of plaintiff Terri Slanetz and obtained her release. Plaintiffs again introduced no evidence of a significant risk of physical injury or actual physical injury resulting from the use of OC at this incident.

In each of these incidents the deputies applied water from a spray bottle, in some cases before the plaintiffs released, in order to limit the discomfort caused by the pepper spray.

III

It is undisputed that plaintiffs were subject to lawful arrest and that the officers were obligated to complete the arrests and remove plaintiffs. Furthermore, it is undisputed that the officers were acting pursuant to and in conformity with the defendants' policies. The sole question, therefore, is whether the officers used excessive force in effecting plaintiffs' arrest.

The Fourth Amendment prohibits use of excessive force during the seizure of a free citizen. See *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Accordingly, even when an officer has probable cause to seize an individual, the officer must employ a reasonable amount of force when effecting that seizure.

The issue of "[w]hether the amount of force used was reasonable is usually a question of fact to be determined by the jury." *Barlow v. Ground,* 943 F.2d 1132, 1135 (9th Cir. 1991). Numerous courts, however, have decided the issue as a matter of law. See, e.g., *Forrett v. Richardson,* 112 F.3e 416 (9th Cir. 1997) (use of deadly force against violent fleeing suspect held reasonable as a matter of law); *Reynolds v. County of San Diego,* 84 F.3d 1162, 1167 (9th Cir. 1996) (shooting of erratic armed suspect found reasonable as a matter of law); *White v. Roper,* 901 F.2d 1501, 1507 (9th Cir. 1990) (force used to subdue pretrial detainee found reasonable as a matter of law); *Palacios v. City of Oakland,* 970 F.Supp. 732, 740 (N.D. Cal. 1997) (shoving suspect found reasonable as a matter of law); *Denney v. Takaoka,* 1993 WL 96602 (N.D. Cal. 1993) (pain compliance hold found reasonable as a matter of law).

Accordingly, this court must determine whether a verdict finding excessive force would in this case be "sup-

ported by the evidence, that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Eberle v. City of Anaheim,* 901 F.2d 814, 818 (9th Cir. 1990).

When determining whether the force used to effect a seizure was "reasonable," courts must carefully balance the competing interests of the individual and the government. See *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

> Determining whether the force is used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a carefully balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake* * *. [T]he reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them.

Id., 490 U.S. at 396-7 (internal quotations omitted). "The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances." *Hammer v. Gross,* 932 F.2d 842, 846 (9th Cir. 1991) (en banc).

The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs.

First, the severity of the intrusion upon the arrestees' personal integrity was minimal. The officers did not threaten or use deadly force or even employ a significant level of physical force. Rather, the force used was merely the infliction of transient pain without signifi-

cant risk of physical injury. In fact, plaintiffs failed to introduce any evidence that the use of cotton swabs to apply OC posed any risk of injury.

The testimony introduced regarding the risk of injury posed by spraying OC (the so-called "hydraulic needle effect") was ambiguous at best. RT Vol 9 at 160. In addition, the testimony established that this risk was "protected against" by closing of the eyes, which of course was the state of the relevant plaintiff's eyes when sprayed. Furthermore, the Constitution does not require law enforcement officers to avoid every conceivable risk in effecting lawful arrest. The negligible risk, if any, associated with OC spray as used by defendants cannot be deemed sufficient to render the defendants' use of force unreasonable.

Second, the officers had a strong and legitimate interest in quickly removing the trespassing plaintiffs. In each incident, plaintiffs were part of a large group of protestors operating in an organized and concerted effort to invade private property, obstruct business and hinder law enforcement. Although these crimes are misdemeanors, "[t]he wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of citizens." *Bray v. Alexandria Woman's Health Clinic,* 406 U.S. 263, 287, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (Kennedy, J. concurring). Here, the officers had a substantial interest in preventing the organized lawlessness of plaintiffs, in protecting the property rights of the lawful occupants and in returning to the officers' primary duties.

Third, plaintiffs failed to present any evidence that the officers had a viable alternative means for effecting arrest. Rather, plaintiffs merely suggested that the officers ought to have (1) used the Makita grinder to cut plaintiffs free; (2) used a manual mechanical pipe-cutter to cut plaintiffs free; or (3) used further negotiations or "waited plaintiffs out."

In the past, defendants have used, without serious injury, a Makita grinder to cut through black bears and effect the arrest of locked-down protestors. This device employs an abrasive blade that spins at extremely high speeds enabling it to cut through steel. Defendants introduced uncontroverted testimony that use of such a cutting device poses a substantial risk of injury to both locked-down ptotestors and the operating officer. The mere fact that the Makita grinder has been used in the past without inflicting injury does not establish that it is less dangerous than the use of OC. In addition, officers gave uncontroverted testimony that the spray of sparks that result from operation of the grinder can and did present a significant risk of fire at each incident. The officers, before exposing plaintiffs to the threat of serious physical injury by cutting them out, opted instead to use first a pain compliance technique that posed no significant threat of physical injury to anyone present at the scene. No reasonable juror could conclude that this decision was unreasonable.

As an alternative to the Makita grinder, plaintiffs produced a manual pipe cutting device. This device was not offered into evidence, however, and was met with uncontroverted testimony that such a device was considered and rejected by the defendants. The uncontroverted evidence established that such a device would be totally ineffective due to (1) its ungainly proportions and opera-

tion, (2) its inability to cut close enough to the right angle of the black bear to allow access to the clip, and (3) its inherent tendency to leave extremely sharp edges resulting in a significant risk of injury. The officers' decision not to use such a device was unquestionably reasonable.

Finally, plaintiffs suggested that the officers ought to have further negotiated with plaintiffs or otherwise attempted to "wait them out." This suggestion ignores plaintiffs' own testimony that they had no interest in negotiating and intended to remain locked-down as long as possible. Indeed, plaintiffs testified that the purpose of their trespass was to disrupt the lawful occupants' use of their property for the maximum extent of time. Plaintiff Portugal went so far as to assert that the need to use a restroom was not an obstacle to remaining in the lock down devices indefinitely. Furthermore, plaintiffs' suggestion that the deputies ought to have waited plaintiffs out ignores the fact that the plaintiffs were unlawfully trespassing on private property and that their presence was an intentional and *continuing* intrusion on the rights of the lawful occupants.

In addition, police officers are not required to use the lease intrusive degree of force possible. Rather, as stated above, the correct inquiry is whether the force that was used to effect a particular seizure was objectively reasonable, viewing the facts from the perspective of a reasonable officer on the scene. See *Graham,* 490 U.S. at 396; *Forrester v. City of San Diego,* 25 F.3d 804, 807-8 (9th Cir. 1994). Whether officers hypothetically could have used less painful, less intrusive or more effective force in executing an arrest is simply not the issue.

The videotape evidence demonstrates that, after the plaintiffs ignored the officers' *repeated* pleas to stop

resisting arrest and warnings regarding the use of OC, the officers used controlled applications of OC in a manner designed to minimize exposure. Although the officer applying OC to Maya Portugal may have inadvertently touched the surface of her eye, no evidence was introduced by plaintiffs indicating that such contact was harmful or intentional. And, to the contrary, the videotape footage plainly demonstrates that the officers were not making any attempt to open plaintiffs' eyes. This court need not, therefore, consider whether an application of OC to the surface of the eye, if intentional, would constitute excessive force.

The use of pain compliance to gain the cooperation of a resisting arrestee has been repeatedly recognized as reasonable force. See, e.g., *Forrester,* 25 F.3d 804; *Eberle,* 901 F.2d 814; *Denney v. Takaoka,* 1993 WL 96602. Furthermore, several courts have specifically held that the use of OC as a pain compliance instrument, rather than as a means of subduing an attacking or violent suspect, is reasonable as a matter of law. See, e.g., *Monday v. Oullett,* 118 F.3d 1099 (6th Cir. 1997); *Bennet v. Cambra,* 1997 WL 88329 (N.D. Cal.); *United States v. Holloway,* 906 F.Supp. 1437 (D. Kan. 1995); *Passino v. State of New York,* 175 Misc.2d 733, 669 N.Y.S.2d 793 (Court of Claims 1998). Here, nothing in the officers' use of OC supports a conclusion that they acted unreasonably. Plaintiffs have introduced no evidence to the contrary and no reasonable juror could conclude otherwise.

Giving full credence to plaintiffs' factual testimony and to the reasonable inferences flowing from that evidence, this court concludes that, on the record of the case as tried and presented, there is no reasonable basis for jurors to find that the officers' use of OC was object-

ively unreasonable in light of the facts and circumstances confronting them.

IV

In finding that there is no evidentiary basis for concluding that plaintiffs' arrests involved the use of excessive force, the court has determined as a matter of law that neither the offices nor, implicitly, the policies of defendants caused any deprivation of the plaintiffs' Fourth Amendment rights. This renders moot the question whether the city and county policies authorized the use of constitutionally excessive force. See *Forrester*, 25 F.3d at 808 (" 'If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.' ") (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)). Judgment must, therefore, be entered for defendants as a matter of law.

IT IS SO ORDERED.

JUDGMENT.

The action came on for trial before the court and a jury, the Honorable Vaughn R. Walker presiding. Plaintiffs having been fully heard, for the reasons stated in the accompanying order, there is no reasonable basis for jurors to find that the officers' use of OC was objectively unreasonable in light of the facts and circumstances confronting them.

In finding that there is no evidentiary basis for concluding that plaintiffs' arrests involved the use of excessive force, the court has determined as a matter of law

that neither the offices nor, implicitly, the policies of defendants caused any deprivation of the plaintiffs' Fourth Amendment rights. This renders moot the question whether the city and county policies authorized the use of constitutionally excessive force. See *Forrester*, 25 F.3d at 808 (" 'If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.' ") (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)). Defendants' FRCP 50(a) motion for judgment as a matter of law is, therefore, GRANTED.

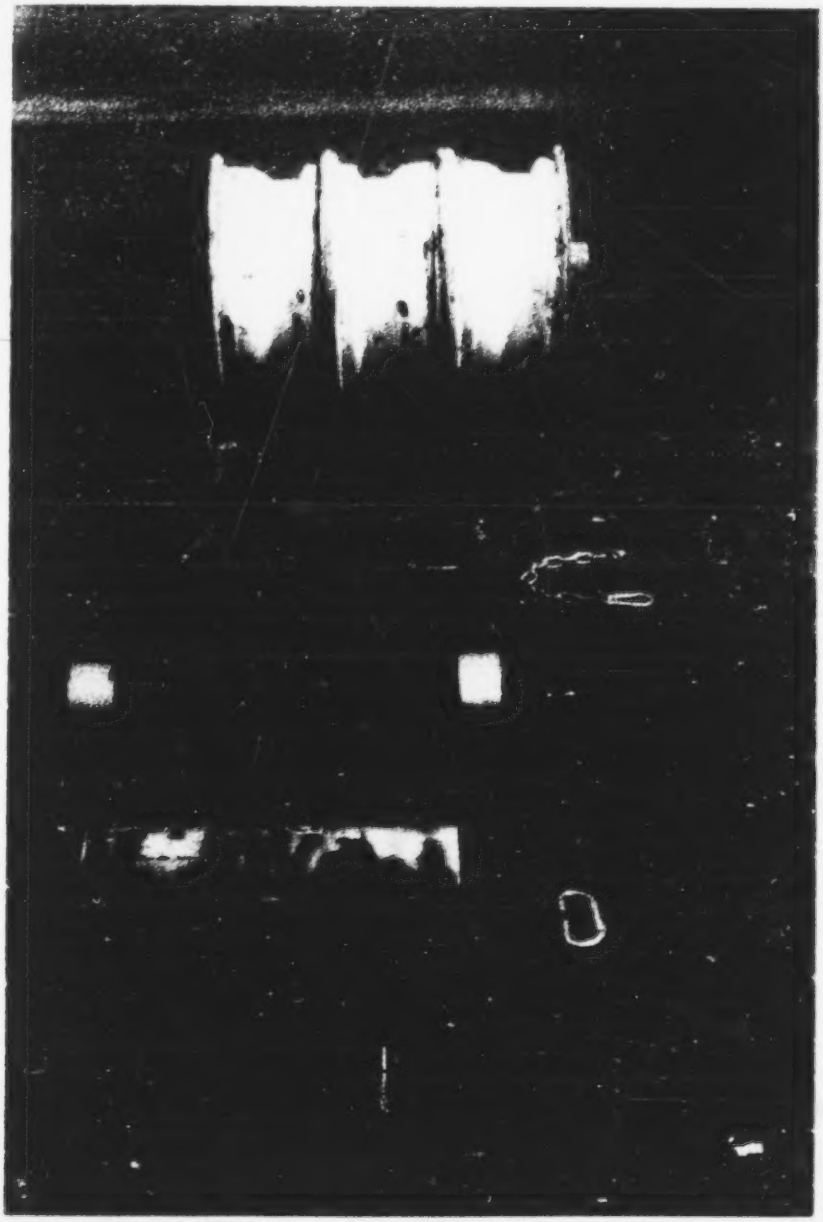
IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover of the plaintiffs their costs of action.

END OF DOCUMENT

APPENDIX C

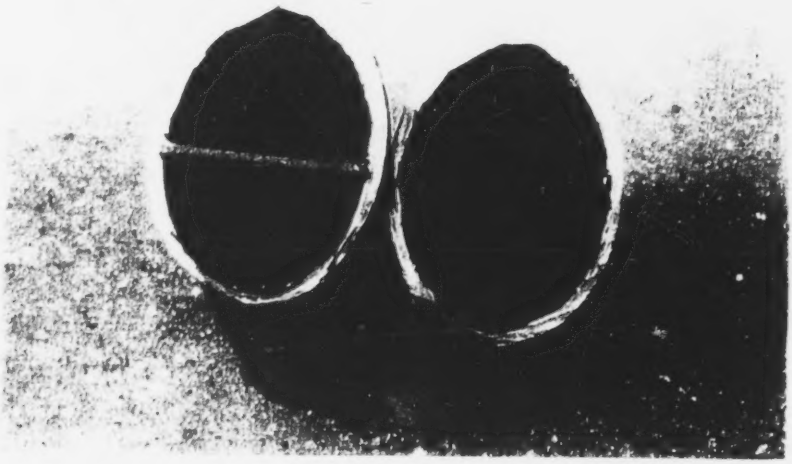
EVOLUTION OF LOCKDOWN DEVICES

(Trial Exhibit N-1, U.S.D.C. (N.D. Cal.) No. C-97-3989-VRW)



APPENDIX D

CROSS-SECTION VIEW OF LOCKDOWN DEVICE
(Trial Exhibit N-8, U.S.D.C. (N.D. Cal.) No. C-97-3989-VRW)



REFERENCE TO LODGINGS

In accordance with Supreme Court Rules, the following items are adjudged impossible to reproduce by printing in the Appendix to the Petition for Writ of Certiorari, and are separately submitted as Lodgings:

- Lodging I – Videocassette of Scotia Arrests
- Lodging II – Videocassette of Vernell "Spring" Lundberg interview.

(2)

Supreme Court, U.S.
FILED
JUN 29 2001
OFFICE OF THE CLERK

No. 00-1649

In The

Supreme Court of the United States

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a reasonable jury could conclude based on an extensive trial record that law enforcement officers' use of pepper spray that caused excruciating pain to passive demonstrators who presented no danger to themselves or others constituted an unreasonable use of force under this Court's well-established balancing test in *Graham v. Connor*.

2. Whether the presence of extensive, disputed historical facts in this case precludes the resolution of qualified immunity claims prior to the fact finder's resolution of those material facts.

LIST OF PARTIES

Respondents agree that the list of parties presented in the petition (Pet. at ii) is accurate and complete.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Headwaters Forest Defense, *et al.* (collectively, "demonstrators"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to U.S. CONST. amend. IV and 42 U.S.C. § 1983, cited by Petitioners, this case also involves FED. R. CIV. P. 50, which states in pertinent part:

> "(a)(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . that cannot under controlling law be maintained or defeated without a favorable finding on that issue."
>
> "(b) . . . The movant may renew its request for judgment as a matter of law by filing a motion not later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: . . . (2) if no verdict was returned: (A) order a new trial, or (B) direct entry of judgment as a matter of law."

STATEMENT OF THE CASE

Nine environmental demonstrators brought an action under 42 U.S.C. § 1983, alleging that law enforcement officers violated their Fourth Amendment rights through

the use of unreasonable, excessive force while arresting the demonstrators for trespass during three peaceful protests. Although the demonstrators were immobilized and posed no threat to themselves or others, officers deliberately swabbed oleoresin capsicum (sometimes called "OC" or "pepper spray") onto the demonstrators' eyelids, sprayed OC into their faces from inches away, and in at least one instance, swabbed OC directly onto a demonstrator's open eyeball.

Significant factual issues in the case remain disputed, but no judge or jury has yet resolved them. After granting summary judgment to all individual line officers on qualified immunity grounds, the district court set the case for trial against petitioners Humboldt County, the City of Eureka, Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, the two supervisory officials directly responsible for authorizing the use of OC on passive demonstrators. At the close of plaintiffs' case-in-chief, the district court ruled that Lewis and Philp were also entitled to qualified immunity as a matter of law and dismissed them. After a nine-day trial, the jury deadlocked with regard to the claims against the City and County. The district court declared a mistrial and set a new trial date. Shortly before that date, however, the district court entered judgment as a matter of law for the remaining defendants pursuant to FED. R. CIV. P. 50. The demonstrators appealed the dismissal of their claims against only Humboldt County, the City of Eureka, Sheriff Lewis, and Chief Deputy Sheriff Philp.

After meticulously reviewing the extensive factual record, the Ninth Circuit concluded that there was sufficient evidence for a rational jury to reach a verdict in favor of the plaintiff demonstrators, and remanded to the district court for a new trial. (Pet. App. A at 33a, 39a). As required in a review of a Rule 50 judgment, the Ninth

Circuit viewed the evidence in the light most favorable to the plaintiffs, the non-moving parties, but did not resolve any of the many fact disputes. (Pet. App. A at 16a); *see Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). The court of appeals observed that the district court's decision improperly failed to honor these standards and was "replete with assertions that the weight of the evidence favors the defendants and with conclusions that the court reached by resolving conflicts in the evidence *against* the nonmoving parties." (Pet. App. A at 16a). Finally, in ordering a new trial, the Ninth Circuit relied on what all parties agree is the controlling legal standard that governs this case, the fact-specific balancing test in *Graham v. Connor*, 490 U.S. 386 (1989).

The Ninth Circuit also held that genuine disputes over historical facts precluded the dismissal on qualified immunity grounds of Sheriff Lewis and Chief Deputy Sheriff Philp, the two individual officials who authorized this unprecedented use of OC. The demonstrators had not appealed the dismissal of the several other individual officers.

Humboldt County, the City of Eureka, Sheriff Lewis, and Chief Deputy Philp (collectively, "County") now ask this Court to review the Ninth Circuit's order granting the demonstrators an opportunity to try this fact-intensive case to a jury.

The demonstrations that form the background of this case were intended to make the public aware of the logging of ancient redwood trees in the Headwaters Forest, along California's northern coast.[1] The

---

[1] Plaintiffs Spring Lundberg, Eric Neuwirth, Molly Burton, and Jennifer Schneider along with three non-plaintiffs participated in a September 25, 1997 protest at the office of Pacific Lumber Company, sometimes referred to in the record as

demonstrations, though they may have inconvenienced a small number of people, were harmless, symbolic acts. The most serious crime with which the demonstrators were ultimately charged was misdemeanor trespass. (Pet. App. A at 29a). Throughout these events, the demonstrators were immobile, peaceful, and non-threatening. Pacific Lumber Video; Riggs Video; Bear Creek Video (collectively, "Videos"). The demonstrations occurred in several places related to the controversy: a Congressman's office; the office of Pacific Lumber, the logging company involved; and a remote logging site called Bear Creek, where two young men locked themselves between the treads of a bulldozer used by Pacific Lumber to rip logging roads. *E.g.*, ER 3-568-569; Riggs Video; ER 3-665; Pacific Lumber Video; ER 2-344; Bear Creek Video. The majority of the demonstrators were young people – two were under eighteen. ER 2-295 (Lundberg); ER 5-1214 (Portugal).

As in many other symbolic protests, the demonstrators used harmless props, signs, and humor to help send their message. For example, they carried sawdust, a tree stump, and a pumpkin into the protest at the Congressman's office. ER 3-568-569.

At each location, the demonstrators also sat or knelt and linked themselves together – in groups ranging from two to seven – with contraptions that, while in use, immobilized their arms and prevented them from moving around. *E.g.*, Videos; ER 2-345-346 (Tendick). The contraptions, nicknamed "black bears," made it difficult,

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the "Scotia protest." Plaintiffs Michael McCurdy and Noel Tendick locked themselves to the treads of a Pacific Lumber bulldozer on October 3, 1997. Plaintiffs Terri Slanetz, Lisa Sanderson-Fox, Maya Portugal and Jennifer Schneider participated in a peaceful demonstration in a Congressman's office on October 16, 1997.

but not impossible, to separate the demonstrators involuntarily. ER 2-459-463 (Held); Pacific Lumber Video (using tools to separate takes 8 minutes); ER 6-1365 (Daastol-officer's testimony that he had removed "approaching a hundred" demonstrators from such devices). Though they may have committed misdemeanors in the course of these acts of civil disobedience, the demonstrators were at no time endangering themselves or others.

What sets these demonstrations apart from so many others is the government's response. In each of the incidents at issue in this case, law enforcement officers ordered the demonstrators to unlink and leave. When the demonstrators did not comply, the officers applied OC in a manner that caused the chemical to come into direct contact with the demonstrators' eyes, noses, mouths, and skin.

Oleoresin capsicum is a chemical agent designed to cause intense, burning, debilitating pain when sprayed toward attackers. *E.g.*, ER 2-225-226 & 2-230 (Hanson). Police and prison guards use OC, spraying it from several feet or yards away to quickly disable aggressive, violent inmates or criminals. *E.g.*, ER 2-230, 2-238 (Hanson); ER 2-494 (Lewis). Even applied from a distance, the chemical can quickly immobilize and disorient large, belligerent attackers or wild animals such as bears. *E.g.*, ER 2-230-231, ER 2-478-479 (Held).

In this case, law enforcement officers applied OC directly to the eyes of the immobile demonstrators. First, the officers forced the demonstrators' faces upward by pulling their heads or hair backwards. *E.g.*, ER 3-571 (Fox-head held against officer's thigh); Riggs Video; ER 3-632 (Burton-describing Lundberg); ER 3-607 (Neuwirth); Pacific Lumber Video; ER 5-1064-1066 (Slanetz); Riggs Video. Then, the officers used Q-tips soaked with

OC to swab the chemical *directly* onto the demonstrators' closed eyes. *E.g.*, ER 2-293-294 (Lundberg); ER 3-608 (Neuwirth). In at least one instance, as one of the demonstrators moaned, "Ow! Don't open it!," an officer swabbed the chemical directly onto the surface of her eyeball. ER 3-675-676 (Schneider); Riggs Video; Trial Exhibit 85.4 (blowup of Schneider's eyeball at time of application). At least three times, officers sprayed the chemical – from inches away – directly onto the eyes of demonstrators, until it ran from the demonstrators' eye sockets. Riggs Video; Bear Creek Video; ER 4-971 (McCurdy); ER 5-1066 (Slanetz). The chemical quickly seeped into eyeballs, into noses and mouths, and onto other parts of the demonstrators' faces and bodies. *E.g.*, ER 3-668 (Schneider); ER 2-352 (Tendick).

Applied directly to the eyelids and eyes of the demonstrators and seeping or running into their noses and mouths and onto other parts of their bodies, the chemical inflicted terrible pain, as the officers knew it would. *E.g.*, ER 5-1063 (Slanetz-officer said "Let your friends know what this feels like."); ER 4-839 (Kirkpatrick). The jury heard testimony that the demonstrators screamed in pain and begged the officers to stop hurting them. *E.g.*, ER 5-1064 (Slanetz screamed); ER 5-1066 (Slanetz pleaded). A 17-year old woman, plaintiff Spring Lundberg, described the initial impact of the OC on her:

> Q: WHAT WAS THE IMPACT? WHAT DID THAT FEEL LIKE ON YOUR EYES?
>
> A: AT FIRST IT WAS JUST WET, AND I WAS SO SCARED. AND THEY WERE PULLING MY HEAD BACK AND SWABBING MY EYE, AND I WAS JUST TRYING TO BREATHE. AND THEN IT STARTED BURNING AND MORE – BURNING MORE AND MORE BURNING. IT FELT LIKE PRETTY SOON I WOULDN'T HAVE ANY SKIN LEFT ON MY

> EYES. AND AROUND MY EYES, THERE WAS SO MUCH PAIN, THE MOST PAIN I'VE EVER FELT.

ER 2-293 (Lundberg). The ensuing shock and the chemical itself made it difficult for the demonstrators to breathe. *E.g.*, ER 2-293-294 (Lundberg); ER 3-609 (Neuwirth); ER 3-668-669 (Schneider); ER 4-970-971 (McCurdy). Moreover, the OC caused pain that lasted long after the application and several hours after the protests ended. ER 5-1067 (Slanetz-too painful to open eye hours after application); ER 2-294 (Lundberg); ER 2-355, 2-359 (Tendick-continued pain, eyes inflamed for hours).

The record also includes evidence that the demonstrators experienced prolonged emotional and psychological injuries from the harm the OC inflicted. *E.g.*, ER 2-296 (Lundberg-panic attacks); ER 3-577-578 (Sanderson-Fox-emotionally fragile, cries frequently for no reason); ER 3-616 (Neuwirth-depressed, emotional all the time, feelings of being violated); ER 3-635-636 (Burton-fear and sadness, nightmares); ER 5-1068 (Slanetz-emotionally sensitive, nightmares, less trusting, fear of police).

In contrast to this evidence about the significant bodily intrusions and emotional harm, there is little evidence to support the County's purported justifications for its use of OC to induce pain on the immobilized demonstrators. The demonstrators' actions appear to have caused, at most, mild inconvenience at the three sites. ER 3-602 (Neuwirth-Pacific Lumber secretary "vaguely amused" by demonstration); ER 5-1059-1060 (Slanetz-Congressman's staff initially "annoyed" but later took photographs for Congressman's scrapbook). The trial evidence showed that the demonstrators were nonviolent and unarmed and that they posed no safety threat to themselves or others. (Pet. App. A at 6a, 7a, 10a, 27a, 28a, 32a); *E.g.*, Videos; ER 2-283 (Lundberg); ER 2-381 (Tendick). There was no evidence of any damage to property

at any of the protests. Thus, nothing in the record indicates that the charged misdemeanors endangered anyone's safety or property.

Finally, the demonstrators presented evidence that the County's use of OC was both unnecessary and ineffective. (Pet. App. A at 30a-32a); Videos. OC often did little or nothing to expedite the arrests of the demonstrators and may actually have prolonged some of those arrests. In several cases, the OC did not induce the demonstrators to release themselves from the black bears. Pacific Lumber Video; Bear Creek Video. In those cases, the officers carried the demonstrators from the site and/or ended up quickly cutting them out with grinders. Pacific Lumber Video; ER 3-613 (Neuwirth); ER 2-462 (Held); Bear Creek Video; ER 2-353-354 (Tendick).

The County argues in support of its qualified immunity claim that officers consulted with various experts about this unique use of OC before they actually used it, but this fact is actually in dispute. Although some evidence suggests that officers consulted about applying OC to demonstrators' cheekbones, the evidence does not show that the officers consulted on what they actually did – swabbing OC directly onto the stretched eyelids and open eyeballs of the demonstrators and delivering full blasts of OC into their closed eyes from inches away. ER 3-724, 3-729 (Risk Manager Kerr-discussed application below eye, on cheekbone; no discussion of full spray); ER 3-315 (Tendick-steady spray directed into eyes); ER 5-1009, ER 5-1101 (Officer Manos-attempted to open clenched eyes slightly to allow OC to enter; goal to get OC into eye); ER 3-674-676 (Schneider-OC swabbed onto open eyeball); Trial Exhibit 85.4 (blowup of Schneider's eyeball at time of application). Although there is some evidence that County officials were so concerned about their potential *criminal* liability for their use of OC in this

context that they consulted the local District Attorney, the District Attorney recommended that they secure a separate and independent opinion on their potential civil liability exposure. ER 3-507 (Lewis-went to DA because concerned about criminal prosecution); 5-993, 5-998 (Philp-criminal liability of officers a possibility; personally concerned that full spray would cause more effect than might be reasonable); (Pet. App. A at 37a). What is more, these officials knew that the California Highway Patrol specifically prohibits the use of OC in the manner in which the officers used it on the demonstrators. ER 3-518 (Lewis).

REASONS FOR DENYING THE WRIT

Notwithstanding the County's characterization of this case as having "far-reaching implications" for Fourth Amendment law and qualified immunity, this case actually involves a rather mundane application of FED. R. CIV. P. 50. The issue is whether the plaintiff demonstrators have presented sufficient evidence to have their claims resolved by a jury. The unresolved questions at this point in the case, including the degree and nature of the harm suffered by the demonstrators and the governmental interest at stake, are questions of fact. As the Ninth Circuit correctly observed, "[w]e are not asked to decide whether the use of pepper spray in this case constituted excessive force or not. We are only to decide whether the district court erred in directing a verdict for the defendants in light of the evidence in the record." (Pet. App. A at 22a n.8).

I.

THIS CASE PRESENTS NO IMPORTANT ISSUES OR CONFLICTS OF LEGAL AUTHORITY REGARDING FOURTH AMENDMENT LAW AND IS THEREFORE NOT WORTHY OF THIS COURT'S REVIEW.

A. IN ITS PRESENT PROCEDURAL POSTURE, THIS CASE CENTERS AROUND THE APPLICATION OF WELL-ESTABLISHED FOURTH AMENDMENT LAW TO THE EXTENSIVE AND DISPUTED FACTUAL RECORD.

There is no dispute about the controlling legal standard in this case. The parties agree that the well-established *Graham v. Connor* reasonableness standard for excessive force claims governs the demonstrators' claims. 490 U.S. 386, 396 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). There is also no dispute that the *Graham* standard requires a "careful balancing of 'the nature and the quality of the intrusion on the individual's Fourth Amendment interests' " against "the countervailing governmental interests at stake." *Id.*

What is firmly in dispute, and the subject of voluminous evidence, are the key fact issues that inform the application of *Graham*: the nature and quality of the County's intrusion on the demonstrators and the extent of the governmental interests asserted as justifications for the use of pain-inducing OC. There are many disputes about what inferences a fact finder should draw from the record evidence and what weight should be given to particular pieces of evidence. Indeed, as the Ninth Circuit noted, the district court inappropriately drew such inferences, weighed evidence, and resolved conflicting material facts in favor of the County, the party that moved for judgment as a matter of law. (Pet. App. A at 16a). *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133,

150-51 (2000) (" 'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge' ") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

The County believes it inflicted no actionable injury on the demonstrators and that it has offered evidence that supports this view. The demonstrators assert the evidence shows that they suffered severe physical injuries, excruciating pain and suffering, and emotional harm. The County believes the evidence shows the governmental interest at stake was enormous; the demonstrators believe their evidence shows that it was minimal. As the Ninth Circuit properly held, the resolution of those issues should take place before a jury.

To transform this case from one raising the mundane question of whether a district court correctly applied FED. R. CIV. P. 50 to one raising questions of constitutional significance, the County has simply asserted that its version of the facts is correct, in essence trying the facts to this Court. Specifically, the County assumes that the excruciating pain caused by its use of OC constituted "minimal" or "de minimus" force and that it caused "no physical injury." (Pet. at 13). As the Ninth Circuit recognized, however, the factual basis for each of these claims is itself in dispute.

Accordingly, the County's petition is based not on the importance of the Fourth Amendment issues, but on its disagreement with the demonstrators' evidence and with the Ninth Circuit's application of the well-established *Graham* standard to the disputed factual record. As such, this case is ill-suited for review by this Court. *See* SUP. CT. R. 10 (petitions rarely granted when asserted error involves "erroneous factual findings or the misapplication of a properly stated rule of law").

Because this dispute is one of fact, not law, a decision by this Court would not provide additional, meaningful guidance to lower courts beyond the existing analytical framework already established in *Graham*. This case therefore simply does not warrant review.

B. THE NINTH CIRCUIT PROPERLY APPLIED THE *GRAHAM* BALANCING FACTORS IN REVIEWING WHETHER THERE WAS SUFFICIENT EVIDENCE UPON WHICH A REASONABLE JURY COULD CONCLUDE THAT THE COUNTY'S USE OF PEPPER SPRAY VIOLATED THE FOURTH AMENDMENT.

The petition should also be denied because the Ninth Circuit properly decided this case under existing legal authority. Review would require this Court to unnecessarily replicate the Ninth Circuit's careful analysis of the evidentiary record, of which the trial transcript alone comprised over 1000 pages.

This Court has held that the Fourth Amendment's "objective reasonableness" standard "governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest. . . . " *Graham v. Connor*, 490 U.S. 386, 388 (1989). *Graham* requires a "careful balancing of 'the nature and the quality of the intrusion on the individual's Fourth Amendment interests' " against "the countervailing governmental interests at stake." *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). "[T]he essence of the *Graham* objective reasonableness analysis" is that "[t]he force which was applied must be balanced against the *need* for that force." *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997) (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994), *cert. denied*, 513

U.S. 1083 (1995)); *see also Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

Graham made at least two things clear about its "objective reasonableness" standard. First, the test does not require plaintiffs to show that they suffered any particular type of injury or that the amount of force exceeded any minimum threshold in order to prevail. Rather, the test requires that in each case the court must examine the government's need for force relative to the harm caused by that force. The force an officer may use against someone attacking him with an axe is much greater than the force an officer may use when trying to obtain a blood sample from someone suspected of committing a misdemeanor. *Compare Schulz v. Long*, 44 F.3d 643, 646 (8th Cir. 1995) (plaintiff attacking with ax shot by officer) *with Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.) (district court did not err in denying directed verdict in blood draw case), *cert. denied*, 502 U.S. 980 (1991). Where the governmental interest is minimal or non-existent, the harm that a plaintiff must show to prevail is not as great. *See Thornton v. City of Macon*, 132 F.3d 1395, 1400 (11th Cir. 1998) (in arrest lacking probable cause "officers were not justified in using any force"); *P.B. v. Koch*, 96 F.3d 1298, 1303 n.4, 1303-04 (9th Cir. 1996) (where no need for force, minimal force is a violation). Thus, there can be no requisite minimum level of harm, because what, if any, force is reasonable varies greatly according to the circumstances.[2]

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[2] The County appears to urge the Court to promulgate a general rule that an excessive force plaintiff must show that government officials have inflicted a physical wound of some sort. (Pet. at 13-14). Such a general rule would conflict with *Graham*'s mandate to balance the intrusion on a citizen's rights against the governmental interest at stake. Worse, such a rule would also allow law enforcement officers to inflict enormous pain on a citizen through methods such as electric shock or OC,

See, e.g., Bass v. Robinson, 167 F.3d 1041, 1046 n.1 (6th Cir. 1999) (extent of injury inflicted is not crucial to analysis of excessive force claim); *Bibum v. Prince George's County*, 85 F.Supp.2d 557, 562-64 (D. Md. 2000) (rejecting de minimus injury requirement for excessive force claims).

Second, the *Graham* test clearly requires an individualized fact inquiry. The "reasonableness" standard is not a test "capable of precise definition or mechanical application." *Graham*, 490 U.S. at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). "[I]ts proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. The *Graham* test requires a factfinder to analyze the "totality of the circumstances" surrounding a particular arrest. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)); *see also Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (inquiry may include specific *Graham* factors and whatever specific factors appropriate in particular case).

Because *Graham* requires a fact inquiry, courts have consistently found that the question of whether government officials used excessive force is ordinarily one for the jury. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 289-90 (3rd Cir. 1999); *Bass v. Robinson*, 167 F.3d 1041, 1046 (6th Cir. 1999); *Liston*, 120 F.3d at 976 n.10; *Quezada v. County of Bernalillo*, 944 F.2d 710, 715 (10th Cir. 1991); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2nd Cir. 1989). No jury has yet resolved the facts of this case. The district court's entry of a Rule 50 judgment precluded the demonstrators' opportunity to have a jury weigh the evidence of the degree of intrusion to the demonstrators' Fourth

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as long as inflicting that pain left no marks, and regardless of whether there was any legitimate governmental justification. Such a general rule would also ignore the fact that a person is quite obviously harmed when subjected to severe, agonizing pain.

Amendment rights, evaluate the evidence on the government's interests, assess the credibility of the material witnesses, or conduct the *Graham*-mandated balancing.

1. A Reasonable Jury Could Find, Based on the Extensive Trial Record, That Officers Severely Intruded on the Demonstrators' Fourth Amendment Rights by Inflicting Excruciating and Debilitating Pain and Emotional Distress.

Graham requires courts adjudicating excessive force claims to assess the " 'nature and quality of the intrusion' " occasioned by the police's particular use of force. *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). Here, there is overwhelming evidence in the record from which a jury could conclude that the officers' use of OC on the demonstrators inflicted a severe intrusion on their Fourth Amendment rights.

Ample evidence demonstrating the nature of the intrusion caused by OC use was presented to the jury. As the Ninth Circuit observed, one County witness testified that OC is "*designed* to cause intense pain, a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx." (Pet. App. A at 21a); *see* ER 2-235-236 (Hanson). *Cf. United States v. Neill*, 166 F.3d 943, 949 (9th Cir.) (holding that pepper spray constitutes a dangerous weapon capable of inflicting death or serious bodily injury for purposes of U.S. Sentencing Guidelines), *cert. denied*, 526 U.S. 1153 (1999).

In different contexts, OC may cause varying degrees of impact. In this case, however, there is substantial evidence to support the demonstrators' claims that the quality of the intrusion on them was extreme. The trial transcript is filled with testimony from the demonstrators

detailing the manner in which the officers applied OC to their eyes and faces and about the direct impact of that application. The evidence shows that OC applications caused blinding, "agonizing," and "searing" pain that lasted for hours. *E.g.*, ER 2-293-294 (Lundberg); ER 7-354-355 (Tendick); ER 5-1063-1065 (Slanetz); ER 5-1228-1229 (Portugal). As one demonstrator testified, "At first, it was just burning, then it got gradually worse and worse, and my eyes started tearing, and it was going down my face and burning where it went." ER 5-1228-1229 (Portugal). Another testified, "It immediately was just raging pain, and it immediately – I couldn't breathe, and I just went into I guess a state of basic life survival, panic, and I kept knocking my head against the stump because the pain was just excruciating." ER 3-674-676 (Schneider). The County's use of OC also impaired the demonstrators' breathing and caused them to hyperventilate. *Id.*; ER 2-293-294 (Lundberg); ER 3-609 (Neuwirth); ER 4-970-971 (McCurdy).

What is more, a reasonable jury could conclude that the County's use of OC was calculated to have maximum impact. The record details the unorthodox and direct manner in which the officers applied OC. As described above, in some instances the officers: forced the demonstrators' faces upward by pulling their heads or hair backwards; used Q-tips soaked with OC to swab the chemical onto the demonstrators' eyelids; swabbed the chemical directly onto the surface of a demonstrator's eyeball; and sprayed the chemical from inches away directly onto demonstrators' eyes until it ran from the demonstrators' eye sockets, causing OC to quickly seep into eyeballs, noses and mouths, and onto other parts of the demonstrators' faces and bodies. *See supra* at p. 5-6. This was done in spite of the fact that the County's deputy in charge of chemical agent training testified that

spraying OC into a person's face from less than 3 feet is not safe. ER 2-275-276 (Hanson). There was also evidence that demonstrators experienced emotional and psychological injuries from the harm the OC inflicted. *See supra* at p. 7. Such injuries are clearly cognizable in § 1983 actions. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986) (damages for § 1983 claims may include mental anguish and suffering).

The County officials clearly understood that the OC would have these effects. ER 3-673-674 (Schneider-during Riggs protest, officer said "Jennifer, haven't you told your friends what we're going to do to you today?"); ER 5-1063 (Slanetz-officer said "Let your friends know what this feels like."). In conjunction with this testimony, there is also conflicting evidence whether officers used hand-held water spray bottles to relieve the intensity of the demonstrators' pain or whether this use actually increased the severity of the intrusion by causing the OC to spread to demonstrators' mouths and noses. ER 3-669-670 (Schneider); (Pet. App. A at 23a).

The Ninth Circuit thoroughly examined this evidence and concluded that there was undoubtedly sufficient evidence presented in this case to take it to a jury and from which a jury could find a cognizable intrusion on the demonstrators' Fourth Amendment rights. Given this Court's admonition that in Rule 50 motions, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence," *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), the Ninth Circuit's decision was entirely appropriate and review of this case is unwarranted.

2. A Reasonable Jury Could Find, Based on The Extensive Trial Record, That the County's Interests, If Any, Were Outweighed by the Intrusion on the Demonstrators.

Graham identified three items that a factfinder should consider when determining whether the government's use of force was reasonable: 1) "the severity of the crime at issue"; 2) "whether the suspect poses an immediate threat to the safety of the officers or others"; and 3) "whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396.[3] The factors all concern the government's need to use force in a particular situation. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994), *cert. denied*, 513 U.S. 1083 (1995); *Spann v. Rainey*, 987 F.2d 1110, 1115 (5th Cir. 1993).

The Ninth Circuit's decision carefully walks through each of the County's possible justifications for the use of OC on the peaceful demonstrators. (Pet. App. A at 25a-31a). On each point, the court properly concluded that a reasonable jury could find that the evidence did not support the County's arguments about the necessity for use of pain-inducing chemical agents to effect the demonstrators' arrests. This conclusion is particularly defensible in light of this Court's statement that "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000).

1. There was evidence of the ineffectiveness of OC in advancing the County's purported interest in the arrest

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[3] The three factors listed in *Graham* are not exclusive, but provide a convenient framework to discuss the evidence in this case.

and quick removal of the demonstrators. Indeed, the record showed that while the officers inflicted great pain when they applied OC, the use of the chemical agent did little or nothing to expedite the arrest of the demonstrators. Pacific Lumber Video (separating with tools takes about 8 minutes); ER 3-613 (Neuwirth); ER 2-462 (Held-7 or 8 minutes to cut contraption). Similarly, the officers used OC to inflict great pain on the demonstrators locked to the bulldozer, but a jury could reasonably conclude that using OC actually prolonged the actual arrest, because the demonstrators who had OC applied to them did not unlink and were ultimately safely separated with a grinder and removed from the site. Bear Creek Video; ER 2-353-354 (Tendick). At the demonstration at the logging site, the officers waited half an hour for a videographer to arrive before even applying the OC, and one officer said that they had "all day to do this." Bear Creek Video.

2. The Ninth Circuit properly rejected the district court's conclusion that the County had a substantial interest in preventing organized lawlessness by a large group of demonstrators. (Pet. App. A at 26a-27a). The largest protest involved only seven individuals. Pacific Lumber Video. The County relies on its own officers' speculation that other demonstrators may have been hiding in the woods near the Bear Creek demonstration. As the Ninth Circuit observed, however, "there is no evidence that a large, lawless group was anywhere in sight." (Pet. App. A at 26a). At most, this represents conflicting evidence on a material fact.

3. A reasonable jury considering the *Graham* factors could also find that the demonstrators posed absolutely no threat – "immediate" or otherwise – to anyone. The demonstrators were nonviolent and unarmed. Videos;

(Pet. App. A at 27a). There is no evidence that any demonstrator threatened the officers or anyone else. On the contrary, there is evidence that the demonstrators smiled at and talked with the officers on the scene. ER 5-1061 (Slanetz). Videotapes of the demonstrations show that, far from being a threat, the demonstrators were the most vulnerable people present. Videos. When they linked themselves together, the demonstrators were immobilized and had surrendered all capacity to defend themselves. *Id.* In all three protests, the officers completely surrounded the demonstrators. *Id.* The demonstrators' vulnerability is underscored by the relative ease with which the officers placed OC onto their eyes. Videos.

For the same reasons, a jury could reasonably find that no plaintiff was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. In fact, during the demonstration in the Congressman's office, the demonstrators were not only immobilized, but also had been locked into the office by the Congressman's staffer. ER 5-1059 (Slanetz).

4. The record likewise does not support the County's claims that its actions were justified by any exigencies. As the Ninth Circuit pointed out, the only exigency the officers testified about was the demonstrators' use of the "black bear" devices to immobilize themselves. (Pet. App. A at 29a). But the evidence showed that before the officers even arrived at the scenes of the demonstrations, the County had decided to use OC indiscriminately on any demonstrator using a lock-down device. ER 4-483 (Lewis); (Pet. App. A at 6a, 29a). A reasonable jury reviewing this evidence could surely disbelieve the County's assertion of an emergency. *Reeves*, 530 U.S. at 151 (courts reviewing Rule 50 motions must disregard all evidence favorable to the moving party that the jury is not required to believe).

5. A jury could reasonably view *Graham*'s "severity of the crime" prong as minimal in this case. The demonstrators were ultimately charged with misdemeanors, not felonies.[4] *See Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir.) (noting misdemeanors less severe than felonies in analyzing Fourth Amendment violation), *cert. denied*, 502 U.S. 980 (1991). Even the trespasses associated with the demonstrations did not appear to cause great disruption. There is evidence that during the protest at Pacific Lumber's office, the secretary was "vaguely amused." ER 3-602 (Neuwirth). At the Congressman's office, the staff was initially "annoyed" but later took photos of the demonstration "for the Congressman's scrapbook." ER 5-1059-1060 (Slanetz). There was also evidence that the Congressman's staff was "walking around" and "answering the phone and talking." ER 5-1065 (Slanetz). There is no evidence that the young men chained to the bulldozer's tread injured the bulldozer or anything else. In light of the incomparably more horrifying and violent crimes that our society experiences each day, a juror could reasonably conclude the demonstrators' "crimes" were not at all severe.

6. A jury might reasonably consider evidence that the officers had declined to use other more effective and less painful alternatives to arrest the demonstrators as evidence of the need, or lack thereof, for the government to use OC. The demonstrators presented evidence that

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[4] The district court found that the government had an interest in "protecting the property rights of lawful occupants." (Pet. App. B at 47a); ER 6-1419-1420. This element is included in *Graham*'s "severity of the crime" factor. As discussed in the text, there was evidence from which a jury could infer, contrary to the district court's determination, that the intrusion on property rights was minimal. There was no evidence of any damage to property at any of the protests.

officers could and did use tools to unlink them. Pacific Lumber Video; ER 2-465-467 (Held-acknowledging fire risk from tools can be mitigated); ER 4-813 (no fire danger present at Pacific Lumber); ER 6-1270-1271 (Reynolds-past use of grinders did not cause serious injury or fire). That the County disagrees with this evidence is not a ground for preventing this case from going to trial.

7. Finally, in the face of minimal evidence supporting the County's purported justifications for using OC, the demonstrators presented evidence from which a jury could reasonably conclude that the government did not need to use OC to effect an arrest of the demonstrators, but rather used it to punish the demonstrators for protesting. *E.g.*, ER 5-1063 (Slanetz-officer said "Let your friends know what this feels like."). That evidence could also be reasonably read in the context of other evidence that the County's unique use of OC on the demonstrators in this case was not a standard police technique. Swabbing OC onto the eyes of demonstrators was something new, not a practice used anywhere else in the United States. ER 3-518 (Lewis). There was evidence that the California Highway Patrol specifically prohibits the use of OC in the manner in which the officers used it on the demonstrators. *Id.* A reasonable jury could plausibly conclude from such evidence that it should give little credence or weight to the government's asserted need to use OC. Moreover, because the OC use was ineffective, a jury could reasonably conclude that its use was designed to punish the demonstrators rather than to secure their arrests.

In sum, on the factors mentioned in *Graham* a reasonable jury could conclude from all or parts of this evidence that the general governmental interest at stake in this case was minimal, and that the governmental interest in using OC was even less. The "severity of the crime" was

low, and a jury could rationally conclude that the demonstrators posed absolutely no risk of violence or flight.

II.

THE PRESENCE OF EXTENSIVE, DISPUTED HISTORICAL FACTS SOMETIMES PRECLUDES THE RESOLUTION OF QUALIFIED IMMUNITY CLAIMS PRIOR TO THE FACT FINDER'S RESOLUTION OF SUCH FACTS.

The County mischaracterizes the holding of the Ninth Circuit in this case, suggesting without foundation that the court's decision is tantamount to the categorical elimination of qualified immunity defenses in all excessive force cases. (Pet. at 21-22). The County is twice mistaken. First, the appellate court's decision does not in any way reject the applicability of qualified immunity in *all* excessive force cases. Second, the opinion does not even foreclose the possibility of qualified immunity being applied to these defendants at the new trial in *this case*.

As required by Supreme Court precedent, the Ninth Circuit's decision analyzed the individual defendants' qualified immunity claims in light of the clarity of the underlying Fourth Amendment law of excessive force. (Pet. App. A at 34a). The Ninth Circuit pointed out that under this Court's controlling precedent:

> For a right to be "clearly established," its "contours . . . must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *[Mendoza v. Block*, 27 F.3d 1357,] . . . 1361 [(9th Cir. 1994)] (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (alternation [*sic*] in original). Although plaintiffs need not show that the very action challenged was previously held unlawful, they must show that

> " 'in the light of pre-existing law the unlawfulness must be apparent.' " *Id.* (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034).

(Pet. App. A at 34a). While recognizing that qualified immunity is generally a question of law, the decision correctly concludes that because of the high level of factual dispute over historical events in this case, the trial court erroneously granted qualified immunity as a matter of law at this stage of the litigation. (Pet. App. A at 33a, 36a-39a).

This conclusion precludes the application of qualified immunity neither in all excessive force cases nor in this case. The qualified immunity defense is available at many different stages of litigation. *See Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (allowing multiple interlocutory appeals from district court denials of qualified immunity claims at various stages of pretrial litigation). Although one of the principal functions of the defense is to provide for early termination of insubstantial claims, *Saucier v. Katz*, No. 99-1977, slip op. at 5 (U.S. June 18, 2001), such termination is not always available where genuine issues of historical fact exist. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 90-98 (1997). This Court has always urged early resolution of qualified immunity claims *where possible*. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (acknowledging that if plaintiff's alleged facts differ from defendant's version of the facts for purposes of assessing defendant's reasonableness, discovery may be necessary before qualified immunity can be adjudicated).[5]

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[5] Qualified immunity serves other goals in addition to limiting the litigation burdens imposed on public officials by civil rights claims. Promoting fairness and ensuring against inhibiting public officials from performing their duties are also

Thus, the preclusion of qualified immunity review in this particular case is a function not of the Ninth Circuit's framing of the legal question, but of the sometimes fact-intensive nature of qualified immunity analysis under the Court's prevailing reasonableness standard. *Id.* This Court has recognized as much, and has acknowledged that the goals of early termination may not always be accomplished where material facts are disputed. *See Johnson v. Jones*, 515 U.S. 304, 307 (1995) (establishing exception to ordinary rule allowing interlocutory appeals of orders denying qualified immunity where the basis of the denials is a dispute about the underlying facts). Moreover, the complication of material fact disputes is in no way limited to excessive force cases. *See, e.g., Gardenhire v. Schubert*, 205 F.3d 303, 311 (6th Cir. 2000) (observing in wrongful arrest case that some qualified immunity claims cannot be resolved before trial if immunity claim itself turns on disputed facts).

Indeed, while it is not the norm, it is also not uncommon for qualified immunity claims to require some factual findings at the trial stage before they can be resolved. *See, e.g., Martin v. Heideman*, 106 F.3d 1308, 1310-11 (6th Cir. 1997); *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994). Given this precedent, there is little remarkable about the Ninth Circuit's holding, and certainly nothing worthy of this Court's full review.

The fact that in some cases – such as this one – a qualified immunity determination can be made only after resolution of some disputed facts does not, as the County argues, suggest the demise of qualified immunity generally. In fact, this case itself demonstrates the effectiveness

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part of this Court's stated objectives. *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982). To some degree, those goals may be achieved even by application of the qualified immunity doctrine in later stages of litigation.

of qualified immunity in limiting litigation against government officials. The trial court granted summary judgment to several individual line officers in this case on qualified immunity grounds, a dismissal that the demonstrators did not appeal. The only two individual officers left in the case are Sheriff Lewis and Chief Deputy Sheriff Philp, who not only supervised the line officers but also authorized the use of OC on passive, non-violent demonstrators.

Furthermore, this Court's recent decision in *Saucier v. Katz*, No. 99-1977 (U.S. June 18, 2001), does not alter the issues presented by this case. In *Saucier*, this Court held that it is improper to conflate the analysis of an official's reasonableness under *Graham* with that official's reasonableness for purposes of qualified immunity. *Id.* at 1. The Court indicated that an officer who used an unreasonable level of force under the Fourth Amendment could nonetheless be entitled to qualified immunity. *Id.* at 7-8.

In reaching this conclusion, however, this Court reaffirmed that the relevant inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" Slip op. at 6 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)) (emphasis added). Both the determination of whether an officer used excessive force and whether that officer is entitled to qualified immunity remain fact-based inquiries requiring a careful examination of all material facts. When the underlying facts about that situation are themselves in conflict, however, a court may not be capable of quickly resolving a qualified immunity claim in some excessive force cases. This is precisely what occurred below.

As the Ninth Circuit observed in this case, "where essential historical facts concerning what an official knew or did are in dispute, 'it is clear that these are questions of fact for a jury to determine.' " (Pet. App. A at 35a) (citation omitted). Here, many material facts relating

specifically to the qualified immunity claims remain in dispute, precluding their final determination at this point. In contrast, in *Saucier* the Court held that even under the plaintiff's version of the facts a reasonable officer could have believed that the minimal physical contact in that case did not violate the *Graham* standards.[6] Given these fundamental differences in the facts and procedural postures of the two cases, it would make little sense to vacate the Ninth Circuit's decision in this case and remand for reconsideration in light of *Saucier*.

As the Ninth Circuit held below, here there are numerous historical fact disputes relating not only to the amount of force used and the justifications for that force, but also to Sheriff Lewis's and Chief Deputy Philp's supervisory roles in implementing the policy of OC use on passive demonstrators and ensuring it was carried out by their subordinates. (Pet. App. A at 36a, 37a). A careful and fair reading of the Ninth Circuit's decision reveals that this was the central basis of its qualified immunity holding.

The record reveals, for example, that there are fundamental disputes concerning how Lewis and Philp instructed their subordinates to apply OC. Philp testified that he gave instructions discouraging officers from the direct application of OC to the nose and mouth areas and forbidding them to apply it in close proximity to the open eyeball. (Pet. App. A. at 37a). In contrast, the officer in charge at each demonstration testified that Philp and Lewis authorized full spray blasts of OC. ER 4-911-912 (Ciarabellini). These are not peripheral fact disputes, but

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[6] It bears mentioning that the state's asserted interests in *Saucier*, the safety and security of the Vice President of the United States, exceed by leaps and bounds the County's asserted interests in effectuating the arrests of immobilized, non-violent demonstrators. *Saucier v. Katz*, No. 99-1977, slip op. at 13-14 (U.S. June 18, 2001).

evidentiary conflicts that go to the heart of the qualified immunity claim.

Similarly, to the extent that the County relies on facts asserting that Lewis and Philp consulted a county risk manager and the local District Attorney about the use of OC on passive demonstrators, the evidence on the nature and scope of such consultation is in dispute. For example, while there is some evidence that officers consulted with the risk manager about limited applications of OC to cheekbones, the risk manager herself testified that she was never consulted about the types of applications that actually occurred. ER 3-724, 3-729 (Risk Manager Kerr-discussed application below eye, on cheekbone; no discussion of a full spray). The risk manager also disputes the actual extent of any consultation. *Id.*; (Pet. App. A at 38a). In addition, the County presented some evidence that Lewis and Philp were concerned enough about the use of OC in this unprecedented context to ask the District Attorney for an opinion regarding the officers' potential criminal liability, but the evidence also shows that the District Attorney limited the opinion to criminal culpability, and advised them to obtain a separate and independent opinion on the potential civil liability exposure. ER 3-507 (Lewis); ER 5-993, 5-998 (Philp).[7] These facts should also be viewed in light of the fact that the California Highway Patrol specifically prohibits the use of OC in the manner in which the officers used it on the demonstrators. ER 3-518 (Lewis); *cf. Park v. Shiflett*, 250

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[7] In any event, the fact that a public official seeks legal advice is not determinative of whether the law was clearly established at the time of the allegedly unconstitutional act. *See Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993); *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482, 1488 n.5 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990). The law was either clearly established, or it was not.

F.3d 843, 852-53 (4th Cir. 2001) (rejecting qualified immunity for officer who sprayed pepper spray in eyes of non-threatening suspect at close range, in violation of department's rules and regulations). Because these disputed facts go directly to the validity of the underlying basis for qualified immunity, early resolution of the qualified immunity claim is simply not possible in this procedural posture.

Finally, the County's representation of a circuit split on the clearly established nature of this Court's excessive force law is misleading. (Pet. at 25-27). The County's citation to cases from different circuits suggests that there is a division with respect to the level of generality at which a clearly established right is articulated. *Id.* Some courts tend to state the right to be free from excessive force more generally, while others state it more closely in relation to the specific facts alleged in the relevant case.

This sets up a false conflict. This Court's cases have always been clear that a plaintiff may not defeat a qualified immunity defense simply by pleading that a clearly established right exists at high level of generality (*e.g.*, a clearly established right to due process of law). *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). *Saucier* reconfirms this. Slip op. at 6. At the same time, the plaintiff need not allege that the precise action in question has previously been declared unconstitutional in order to defeat a qualified immunity claim. *Anderson*, 483 U.S. at 640. No law can be clearly established entirely in the abstract regardless of the factual circumstances. Thus, in order to analyze whether a reasonable officer could have believed his or her conduct violated a clearly established right, a court must always look at the facts that confronted the officer. *Saucier*, slip op. at 11 ("Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred"). Inconveniently, sometimes those facts are disputed. The Ninth

Circuit's resolution of the qualified immunity claim is perfectly consistent with the Court's instructions on how to administer such claims. The decisions cited by the County are all consistent with this understanding of qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Dated: June 29, 2001

(3)

Supreme Court, U.S.
FILED
JUL 31 2001
OFFICE OF THE CLERK

No. 00-1649

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. AS A CASE DEVOID OF *MATERIAL* FACTUAL DISPUTES, THE *HEADWATERS* DECISION IS BEING CITED BY LOWER COURTS ON ISSUES OF FUNDAMENTAL FEDERAL LAW FOR PROPOSITIONS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND THAT CREATE A VACUUM FOR LAW ENFORCEMENT POLICY MAKERS.

Rather than involving – as plaintiffs assert in opposition to certiorari – "the mundane question of whether a district court correctly applied Fed.R.Civ.P. 50," *Headwaters* has been cited by the lower courts on fundamental issues of constitutional law inconsistent with the decisions of this Court. This case is unusual in the sense that the trial judge was able to rely upon videotapes documenting each use of force at issue and thus, exaggerations of plaintiffs and hyperbole of counsel embraced by the Ninth Circuit as "factual disputes" worthy of jury resolution, were properly disregarded by the court below, revealing purely legal issues. The truly "unprecedented" aspect of the case is not the "use of force" at issue, but rather the undisputed level of resistance to arrest by plaintiffs which evidenced a stalwart determination to delay lawful arrests, obstruct justice and cause the maximum disruption of police services to any community plaintiffs chose to target.[1]

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[1] It is a measure of plaintiffs' unsupportable position that they are forced to argue that there is no evidence that they were actively resisting arrest (Resp. Brief at 20). It was undisputed that plaintiffs fabricated, transported and employed twenty-five pound metal devices for the sole purpose of obstructing law enforcement efforts to effect their lawful arrests. This context underscores why law enforcement policy makers approved a measured, tactical use of force to overcome the resistance.

A. The *Headwaters* Decision Is Being Cited By Lower Courts On Issues Of Fundamental Federal Law Inconsistent With The Decisions Of This Court.

In the short time since its publication and the writing of this brief, the *Headwaters* decision has been cited by the Ninth Circuit for substantive Fourth Amendment law and on qualified immunity issues.

In *Deorle v. Rutherford*, 242 F.3d 119 (9th Cir. 2001), the plaintiff was injured when shot by a police officer with a lead-filled "bean bag." In determining that the force used was excessive as a matter of law, the court referenced the *Headwaters* decision seven times. The court also cited *Headwaters* in denying qualified immunity for the proposition that, in an excessive force case, "the qualified immunity test is the same as the test on the merits."[2]

In *Clavette v. Sweeney*, 132 F.Supp.2d 864 (D. Ore. 2001), a homeowner sued members of a police department, claiming he was falsely arrested and subjected to excessive force when he resisted efforts of firefighters to enter his property. The district court denied the defendants summary judgment on the excessive force claim, citing *Headwaters* for the proposition that: "If evidence suggests officers could have used other tactics to effect an arrest, the reasonableness of the force they used is a question for the jury." *Id.* at 871. In denying qualified immunity, the district court also cited *Headwaters* for the proposition that: "the law regarding the

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[2] As will be discussed in the next section of this brief – the Ninth Circuit's conclusion that the issue of excessive force and qualified immunity are one and the same is in direct conflict with this Court's recent holding in *Saucier v. Katz*, 121 S.Ct. 2151 (2001).

use of force was clearly established at the time of the events at issue." *Id.* at 872.

Thus, the lower courts do not share plaintiffs' view that *Headwaters* represents a "mundane" application of Federal Rule 50.

B. There Are No *Material* Disputed Facts.

Plaintiffs also assert that review is not warranted "[b]ecause this dispute is one of fact, not law. . ." Resp. Brief at 12.

First of all, the plaintiffs do not identify any disputed facts that are material, if the appropriate constitutional standards are applied. It remains uncontroverted that all plaintiffs were subject to arrest as a matter of law, that all plaintiffs resisted arrest by encasing their arms in steel devices fabricated and developed for the sole purpose of resisting arrest, and that all plaintiffs were taken into custody without physical injury following the limited application of pepper spray. All of this is admitted by plaintiffs and documented on the videotapes submitted to this Court and to the courts below.

Rather than identify *material* factual disputes, plaintiffs continue to focus on questions of no legal consequence. Thus, plaintiffs discuss the purported "ineffectiveness" of the subject use of pepper spray, claiming that "the use of the chemical agent did little or nothing to expedite the arrest of the demonstrators." Resp. Brief at 18-19. Ignoring the fact that the applications of pepper spray caused the majority of the demonstrators to disengage from their Black Bear devices – plaintiffs cite no authority for the proposition that the "effectiveness" of the force used is relevant to the issue of whether or not it is reasonable under the Fourth Amendment.

Plaintiffs also claim that a "dispute" as to the number of protestors involved "represents conflicting evidence

on a material fact." *Id.* at 19.[3] Again, plaintiffs cite no authority and present no cogent argument why a conflict as to the number of protesters involved constitutes a material issue. In fact, the videotapes again provide uncontroverted evidence, and plaintiffs testified to the involvement of planning, media, affinity, and support groups.

Plaintiffs posit that the existence or nonexistence of "exigencies" at the time of the subject arrests is a material issue. Once again plaintiffs fail to cite any authority for the proposition that the use of force to effect a lawful arrest requires an emergency. No such authority exists, and for good reason. In each of the incidents, law enforcement officials responded to the requests of property owners to remove trespassers intentionally interfering with lawful use of the property by its owners. No "emergency" is required to justify the arrest of someone breaking the law. Rather, law enforcment officers would violate their sworn duties to enforce the law if they chose not to arrest due to the absence of "exigencies."

Plaintiffs also cite "evidence that the officers had declined to use more effective and less painful alternatives to arrest" as evidence of a material dispute. Even assuming *arguendo* that the use of an electric-powered steel saw within inches of arms and hands is a "better alternative" than the use of pepper spray (a substance which poses no known risk of injury), it is well established that law enforcement officials are not required to contemplate and select the most "effective" means

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[3]Plaintiffs neglect to point out that scores of activists were gathered outside both the Pacific Lumber Company office and the office of Congressman Riggs in Eureka, and others can be heard from undisclosed locations throughout the forest at Bear Creek, at the time of the plaintiffs' "direct actions." The videotape evidence is uncontroverted on this issue.

to accomplish a lawful arrest.[4] *Scott v. Henrich*, 39 F.2d 912, 915 (9th Cir. 1994) (requiring officers to find and choose the least intrusive alternative would require them to exercise "superhuman judgment") *cert. denied*, 115 S.Ct. 2612 (1995).

Likewise, the Ninth Circuit's suggestion that the officers should have "negotiated" with the plaintiffs raises an issue of no legal consequence. To begin with – as plainly seen on the videotapes – the officers repeatedly *pleaded* with the plaintiffs to submit to arrest by releasing from the Black Bear devices These pleas where uniformly ignored by the plaintiffs. More importantly, the Ninth Circuit's "negotiation requirement" represents an unprecedented exception in Fourth Amendment jurisprudence. Until the *Headwaters* decision, no court has ever required law enforcement officers to engage in "negotiation" with political activists as a prerequisite to lawful custodial arrest.[5]

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[4] Nor was there any conflict in the evidence of defendants' continuing efforts to find safer alternatives to the grinder. Indeed, plaintiffs offered evidence that a hinged pipe cutter could be used without the fire risk posed by the grinder. This had been tested by defendants and found wanting because of the razor sharp edges created and the potential for serious shoulder injuries to the protesters from the torque of the device. It should be noted that use of the grinder was truly "unprecedented" when developed. There was no pre-*Headwaters* precedent in the Ninth Circuit decisional law approving the removal of heavy metal sleeves from the bodies of arrestees by use of an electric grinder, nor a history of any other law enforcement department doing so before the technique was developed by the Humboldt County Sheriff's Department. Unlike the direct application of pepper spray now taught in P.O.S.T. certified training, this "unprecedented" technique is endorsed by only plaintiffs and the Ninth Circuit panel as plaintiffs could not produce a single law enforcement expert to testify that it was a better alternative.

[5] As noted above, the *Headwaters* decision has already been cited for the (erroneous) proposition that law enforcement officers

[footnote continued]

It is patently unreasonable to expect law enforcement officers to weigh and balance the merit or lack of merit of the political agendas of those engaged in civil disobedience before carrying out their sworn duties to effect lawful arrests. Law enforcement officers should not be made to be participants in political debate, nor should they be expected to play the role of mediator, arbitrator, or psychologist. In the final analysis, the Ninth Circuit's decision renders law enforcement impotent to perform its most fundamental task: to enforce the laws of the jurisdiction served. This function is the very foundation of a law-based society – the alternative is anarchy.

In short, as noted above, the *material* facts regarding the use of force in this case are uncontroverted and, therefore, resolution of the underlying constitutional issue was a pure question of law and represents a threshold constitutional determination by the Ninth Circuit.

C. The Decision Of The Ninth Circuit Provides An Improper Framework For Analysis Of Section 1983 Cases And Requires Law Enforcement Policy Makers To Work In A Vacuum.

This Court, in *Saucier v. Katz*, recently emphasized the importance of resolving the underlying constitutional issue in a case alleging the use of excessive force. In reversing the Ninth Circuit in *Katz*, this Court has instructed both the district courts and the courts of appeal "to concentrate at the onset on the definition of the constitutional right, and to determine whether, on the facts alleged, a constitutional violation could be found . . ." 121 S.Ct. at 2159. The reason for this, as

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must be denied summary judgment if there is evidence that alternative means were not attempted. *See, Clavette*, 132 F. Supp. 2d at 871.

this Court has explained, is to establish threshold constitutional parameters and standards to provide guidance to law enforcement officers and other government officials:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.
>
> 121 S.Ct. at 2156.

In *Headwaters,* the Ninth Circuit has determined, as a matter of law, that it is not enough for law enforcement policy makers to rely upon research, technical information and legal advice, in approving a tactical use of force that *no* law enforcement expert opines is excessive. Instead, if *any* alternative is suggested, jury resolution of the question of whether the use of force is unreasonable under the *Graham* standard is necessary. This threshold constitutional determination can be relied upon (and has been cited) in subsequent cases to define the parameters of both excessive force and qualified immunity. This is not a "mundane" Rule 50 determination.

Plaintiffs also ignore the split of authority in the circuits concerning the use of *de minimis* force resulting in no physical injury.[6] In some circuits, the use of *de minimis* force resulting in no physical injury forecloses the possibility of a section 1983 claim for excessive force.

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[6] As in the courts below, plaintiffs continue to choose terms such as "excruciating," "agonizing," "searing," and "extreme" to describe their reactions to pepper spray, and, for the first time in

[footnote continued]

Nolan v. Isbell, 207 F.3d 1253 (11th Cir. 2000); *Jackson v. R.E. Culbertson,* 984 F.2d 699, 700 (5th Cir. 1993); *Joos v. Ratliff,* 97 F.3d 1125 (8th Cir. 1996) *per curiam.* In contrast, the court in *Headwaters,* consistent with Ninth Circuit decisional law, permitted the prosecution of an excessive force claim in the complete absence of physical injury, holding that it is "well settled" within the circuit that a plaintiff may recover "nominal damages without proof of actual injury." App., *infra,* 20A. The *de minimis* force issue has nothing to do with Rule 50, and granting review would allow this Court to resolve an inter-circuit conflict.

II. AT A MINIMUM – THE *HEADWATERS* DECISION SHOULD BE SUMMARILY REVERSED OR VACATED AND REMANDED FOR RECONSIDERATION IN VIEW OF *SAUCIER v. KATZ.*

On June 18, 2001, after the filing of defendants' petition for writ of certiorari, this Court issued its decision in *Saucier v. Katz.* The *Headwaters* decision is in direct conflict with *Katz* on the issue of qualified immunity.

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their brief to this Court, claim that they suffered "severe physical injuries." Resp. Brief at 11. There was not one iota of evidence presented at trial or anywhere else to substantiate the claim that any plaintiff suffered a physical injury – severe or otherwise. Nothing in the OC studies conducted by the Justice Department or by anyone else supports the unprecedented reactions described by plaintiffs at trial. Indeed, all law enforcement officers must be exposed to a "full-blast" as part of certification training. Furthermore, the videotaped interview of Spring Lundberg conducted shortly after her arrest at the Pacific Lumber incident, shows her laughing, smiling, and in no apparent distress, and cannot be reconciled with plaintiffs' courtroom characterizations of severe pain and distress. See Defendants' Videotape Lodging II. Although it is not disputed that the application of pepper spray causes pain – the intended effect with *any* pain compliance technique – the evidence was undisputed that this pain subsided when

[footnote continued]

Thus, at a minimum, this Court should grant certiorari and summarily reverse on the qualified immunity issue, or vacate the opinion and remand for reconsideration in light of *Katz*.

In *Katz*, as in *Headwaters*, the Ninth Circuit denied qualified immunity on the grounds that a triable issue of fact on the constitutional question precluded granting of qualified immunity to the law enforcement officer. *Katz*, like *Headwaters*, involved the use of force to effect the arrest of a political protester. The use of force in *Katz*, like *Headwaters*, did not result in any physical injury to the plaintiff.

In direct conflict with the Ninth Circuit's holding in *Headwaters* that the general proposition that "the law concerning the use of excessive force is clearly established" is the level of inquiry, this Court held that a more particularized analysis is required:

> . . . There is no doubt that *Graham v. Connor* [ ] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet this is not enough. Rather, we emphasized in *Anderson* "that the right the official is alleged to have violated must be 'clearly established' in a more particularized, and hence, more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." [citation omitted]. . . . If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. [citation omitted]

121 S.Ct. at 2156.

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the OC solution was washed from plaintiffs' faces and eyes by officers with repeated applications of water from spray bottles within minutes of the use of OC. See Videotape Lodgings I and II.

Contrary to the decision in *Katz*, *Headwaters* instructs that no particularized analysis is necessary, and no case law or other authority need be reviewed in analyzing qualified immunity in the context of an excessive force claim.

Neither the Ninth Circuit nor plaintiffs have cited a single case which would have put the defendants on notice that the subject applications of pepper spray constituted excessive force. On the other hand, as noted by the district court in granting judgment as a matter of law: "Several courts have specifically held that the use of OC as a pain compliance instrument, rather than a means of subduing an attacking or violent suspect, is reasonable as a matter of law." Petitioners' Appendix B, 50a.

In the context of this legal landscape, the Ninth Circuit's erroneous application, or, more accurately, non-application, of the "clearly established" prong represents an extreme departure from this Court's holding in *Saucier v. Katz*. No warning whatsoever is provided to law enforcement officials formulating use-of-force policy.

CONCLUSION

Review of *Headwaters* is necessary to correct the misapplication of fundamental Fourth Amendment principles so that law enforcement in the Ninth Circuit may enforce the law without unfettered exposure to groundless civil actions.[7]

Respectfully submitted,

NANCY K. DELANEY

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[7] If the Court does not grant certiorari on both the constitutional and qualified immunity issues, it would be appropriate to grant certiorari as to the qualified immunity question and summarily reverse, *Helvering v. Weise*, 292 U.S. 614 (1934), or remand to the Ninth Circuit for reconsideration in view of *Saucer v. Katz*, *see*, *Kirwan v. Romano*, 425 U.S. 929 (1976); *Lash v. Aikens*, 425 U.S. 947 (1976).